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FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-138

In re Applications of

BRANSTINE FLYING SERVICE, INC. File No. 810116

and

Application of

LIBERAL AIRCRAFT, INC. File No. 810345

For an Aeronautical Advisory Station at Liberal Municipal Airport in Liberal, Kansas

HEARING DESIGNATION ORDER

Adopted: May 7, 1991; Released: May 20, 1991

By the Chief, Special Services Divsion:

1. The applications of Branstine Flying Service, Inc. (Branstine) and Liberal Aircraft, Inc. (Liberal) propose to operate an aeronautical advisory station (unicom) at Liberal Municipal Airport in Liberal, Kansas. Unicom stations provide information concerning flying conditions, weather, availability of ground services, and other information to promote the safe and expeditious operation of aircraft. *See* Section 87.213(b)(1) of the Commission's Rules, 47 C.F.R. § 87.213(b)(1).

2. Both applicants propose to provide service at Liberal Municipal Airport, where there is no control tower or FAA flight service station. Section 87.215(b) of the Commission's Rules, 47 C.F.R. § 87.215(b), authorizes the operation of only one unicom station at such airports. Pursuant to Sections 1.227(b)(4) and 1.973(a) of the Commission's Rules, 47 C.F.R. §§ 1.227(b)(4) and 1.973(a), these applications are mutually exclusive and therefore must be designated for comparative hearing.

3. Liberal operates a unicom station under special temporary authority, initially granted April 4, 1988, and subsequently renewed. Liberal allowed its unicom license to expire prior to April 1988. Branstine has alleged, by letter to the FCC's Field Operations Bureau, Kansas City, Missouri office dated January 23, 1990, and by letter to the Private Radio Bureau dated October 20, 1990, that Liberal does not provide impartial unicom service in accordance with Section 87.213(a) of the Commission's Rules, 47 C.F.R. § 87.213(a). In addition, Branstine has alleged by letter to the Private Radio Bureau dated December 18, 1990, that, since filing their 1988 application, Liberal Aircraft, Inc. has been sold to Aero Center. This sale would constitute a transfer of control without notifying the Commission, in violation of Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65.

4. Accordingly, IT IS ORDERED THAT pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), and Section 1.221(a) of the Commission's Rules, 47 C.F.R. § 1.221(a), the above captioned applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to determine the following issues:

a. To determine which applicant would provide the public with better aeronautical advisory service based on the following considerations:

(1) location of the fixed-based operation and proposed radio station in relation to the landing area and traffic patterns;

(2) hours of operation;

(3) personnel available to provide advisory service;

(4) experience of applicant and employees in aviation and aviation communications;

(5) ability to provide information pertaining to primary and secondary communications as specified in Section 87.213 of the Commission's Rules, 47 C.F.R. § 87.213;

(6) proposed radio system including control and dispatch points; and

(7) the availability of the radio facilities to other fixed-base operators.

b. To determine whether Liberal Aircraft, Inc. transferred control to Aero Center without properly notifying the Commission pursuant to Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65, as alleged by Branstine.

c. To determine whether Liberal provides impartial information concerning available ground services while operating the unicom station, under Special Temporary Authority, in compliance with Section 87.213(a) of the Commission's Rules, 47 C.F.R. § 87.213(a).

d. To determine, in light of the evidence presented, which application, if any, should be granted to best serve the public interest, convenience, and necessity.

5. IT IS FURTHER ORDERED THAT the burden of proceeding with the introduction of evidence with respect to the issues listed in subsection (a) and (d) shall be governed by Section 1.254 of the Commission's Rules, 47 C.F.R. § 1.254. With respect to subsections (b) and (c), the burden of proof shall be upon Branstine.

6. IT IS FURTHER ORDERED THAT to avail themselves of the opportunity to be heard, the applicants, Liberal and Branstine, must each file with the Commission, within 20 days of the mailing of this Hearing Designation Order, a written notice of appearance in triplicate, accompanied by a processing fee of $6,760.00, stating their intentions to appear on the date fixed for the hearing and to present evidence on the issues specified in

this Order, in accordance with Sections 1.221(c), (f) and (g) of the Commission's Rules, 47 C.F.R. §§ 1.221(c), (f) and (g).

7. The time and place of the comparative hearing will be specified in a subsequent Order.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-426

In re Applications of

SHAWN PHALEN	File No. BPH-851231MO
ELLWOOD BEACH BROADCASTING, LTD.	File No. BPH-851231MS
SPIRIT BROADCASTING	File No. BPH-860102MZ
JAMES EVANS	File No. BPH-851231MR

For Construction Permit for New FM Broadcast Station at Montecito, California

Appearances

David Tillotson, *Jay L. Birnbaum*, and *John T. Mitchell* on behalf of Shawn Phalen; *Lewis I. Cohen*, and *Roy Boyce*, and *John J. Schauble* on behalf of Ellwood Beach Broadcasting, Ltd.; *Eric S. Kravetz* on behalf of Spirit Broadcasting, Ltd.; *Peter A. Casciato* and *Lee L. Peltzman* on behalf of James Evans; and *James Shook* on behalf of Chief, the Mass Media Bureau, Federal Communications Commission.

SUPPLEMENTAL INITIAL DECISION
OF
WALTER C. MILLER

Issued: May 13, 1991; Released: May 20, 1991

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INTRODUCTION

1. With the dismissal of Claudia Bratton (FCC 91M-1126 released March 28, 1991), four mutually-exclusive applicants remain in this comparative contest for Channel 225(A) at Montecito, California: (1) Shawn Phalen (Phalen); (2) Ellwood Beach Broadcasting, Ltd. (Ellwood); (3) Spirit Broadcasting, a California Limited Partnership (Spirit); and (4) James Evans (Evans).

2. We held Prehearing Conferences on January 21, 1988, February 1, 1988, and May 23, 1988; we held the Evidentiary Admission Session on June 8, 1988; and we held Hearing sessions on June 27, July 25, 26, and 27, 1988. The original record was closed on Wednesday, July 27, 1988. *See* Tr. 1294, and FCC 88M-2453 released July 29, 1988. The parties filed their Proposed Findings of Fact on September 27, 1988, and Replies on October 18, 1988.

3. The Trial Judge released his Initial Decision on July 25, 1989 (FCC 89D-30).[1] He granted the application of Claudia Bratton. After hearing Oral Argument the Review Board remanded the case to the Trial Judge and instructed him to add a financial issue against Bratton. The Board effectively held that Bratton's *Multi-States* [2] bank letter was nothing more than a good will "accommodation" letter, a letter that did not provide a "reasonable assurance" that Bratton was financially qualified. *See* FCC 89R-82 released January 4, 1990.

4. On remand, and to meet the financial issue the Board wanted tried, Bratton amended her application. She abandoned the "reasonable assurance" test, and instead came in with an absolute loan commitment. Based on her showing the Trial Judge issued a Supplemental Summary Decision (FCC 90D-14, released April 4, 1990), that found her financially qualified and reinstated that Initial Decision that had granted her application.

5. Again the Review Board remanded. *See* FCC 90R-64 released July 24, 1990. They held that the Trial Judge couldn't consider Bratton's new financial plan unless and until Bratton shows she was financially qualified at the time she certified she was.

6. Subsequently, on March 22, 1991, Claudia Bratton, James Evans, and Shawn Phalen filed a "Joint Request For Approval of Partial Settlement." Under that agreement Claudia Bratton agreed to having her application dismissed. The Trial Judge approved the agreement and dismissed Bratton's application. *See* FCC 91M-1126, released March 28, 1991.

7. Since the only issue on remand was her financial issue, and since she had dismissed her application, no remanded hearing was needed. So the Trial Judge closed the remanded evidentiary record, and indicated he "... will issue a Supplemental Initial Decision on the basis of existing evidence and existing precedent Sans Bratton." FCC 91M-1126 *supra*., paragraph 5. This is that Decision.

8. Evidence has been taken on the following issues:[3]

> II-1: To determine whether Shawn Phalen has violated 47 CFR 1.65 by failing to amend her application to reflect that her father, Rick Phalen, had acquired a radio station, and if so, what effect that violation has on Phalen's basic qualifications to be a Commission licensee.
>
> II-2: To determine whether Shawn Phalen deliberately concealed from or lacked candor with the Commission by failing to report her father's media interest, and if so, what effect that concealment or lack of candor, has on her basic qualifications to be a Commission licensee.
>
> II-3: To determine whether Shawn Phalen's father, Rick Phalen, is an undisclosed party-in-interest in Shawn Phalen's application, and if so, what effect that has on her basic qualifications to be a Commission licensee.
>
> II-4: To determine whether Shawn Phalen misrepresented or lacked candor when she affirmatively certified her financial qualifications in BPH-851231MO, and if so, what effect those misrepresentations and/or lack-of-candor has on her basic qualifications to be a Commission licensee.
>
> II-5: To determine whether Shawn Phalen is financially qualified to construct and operate a radio station for three months without revenue.
>
> I-1: To determine which of the proposals would, on a comparative basic, best serve the public interest; and
>
> I-2: To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.[4]

9. Comparative coverage was also adduced under the standard comparative issue. *See* DA 87-1354, released October 8, 1987 at paragraph 17.

FINDINGS OF FACT

Issues II-1 and II-2: Phalen's Failure to Report Issues

10. Shawn Phalen filed her FM application for Montecito on December 31, 1985. There she reported that no other members of her family owned any media interests. That representation was accurate as of December 31, 1985.

11. However, on December 15, 1986, her father, Richard C. (Rick) Phalen acquired the controlling interest in FM station KQKS, Longmont, Colorado. He owns all the voting stock of the licensee of that station. FM Montecito Ex. 21, pp. 36-37. Although Shawn was "generally aware" of her father's acquisition, she did not amend her Montecito application to reflect that fact (Phalen Ex. 2). Thus, her opposing applicants were led to believe that her original representation was still accurate.

12. This proceeding was designated for hearing on October 8, 1987. On October 15, 1987, the Presiding Officer released what turned out to be the first of two Prehearing Orders. *See* FCC 87M-2561.[5] There (at paragraph 4) he instructed each applicant to be sure its diversification position was accurate. Diversification updates were due on or before October 28, 1987. Ms. Phalen did nothing.

13. Shawn Phalen was first deposed on December 21, 1987. There she was questioned about her father's media interest. She still did nothing. So, on January 11, 1988, FM Montecito moved to enlarge the issues against her. *See* FCC 88M-358, released February 11, 1988. It wasn't until January 25, 1988, that Ms. Phalen finally filed an amendment reflecting her father's ownership of KQKS, Longmont. *See* FCC 88M-34 released February 9, 1988.

14. Shawn Phalen had tried to explain away her failure to report Rick Phalen's 1986 acquisition of KQKS, Longmont. She says: (1) that she was ". . . unaware of when he actually acquired the station until the day of my first deposition in this proceeding, December 21, 1987;" (2) that she " . . . did not realize that my father's acquisition of KQKS was a matter I should have reported to the FCC when it occurred;" (3) that "|s|ubsequent to the time that I reviewed and signed my application, I did not review it to see whether it needed to be amended: and (4) that she "relied" on her attorney, David Tillotson, and Tillotson never told her that she needed to report her

father's interest. She also blames the delay in filing her amendment on Tillotson. She says that Tillotson sent the draft amendment to Tucson (where Ms. Phalen was going to college), instead of Montecito (where she lives, and where she was vacationing at the time). Phalen Ex. 2, pp. 11-12.

15. Shawn's defenses are not only weak, they are inconsistent. The record shows that on December 21, 1987, Ms. Phalen knew that her father had acquired an FM station in the Denver area. Indeed she believed he had owned it for two years prior to that date. FM Montecito Ex. 21, p. 33.

16. Her attempts to shift the blame to her attorney, David Tillotson, must fall on either of three reasons. First, Tillotson is also Rick Phalen's Lawyer, and has been for some sixteen years. He handled the Longmont closing, and was careful to report Shawn Phalen's Montecito application in the assignee's portion of the longmont assignment application. Secondly, and *assuming* Tillotson didn't tell her she needed to amend, it is fundamental precept of the law of agency that a principal is responsible for the acts and non-acts of her agent that he performed in the course of his employment. *See* also *Wadeco, Inc.* v. *FCC*, 628 F. 2d 122, 47 RR 2d 177 (D.C. Cir. 1980). And third, this record *infra*., reveals that her father, Rick Phalen, is a real-party-in-interest to her Montecito application. And she didn't want that known, because that would weaken not only her diversification position, but would take away her clout at the negotiation table.

17. *Intermediate Findings*. The foregoing findings (Findings 10-16 *supra*.) lead inexorably to certain intermediate findings. Shawn Phalen has clearly violated 47 CFR 1.65 by failing to timely amend BPH-851231MO. She knew her father had acquired a controlling interest in KQKS, Longmont, but she didn't want to report that interest because: (1) it would lead to an inquiry into what role, if any, Rick Phalen was playing in her Montecito application; (2) it would weaken her diversification position, and (3) it would make her less formidable at the negotiation table. So she deliberately concealed her father's KQKS acquisition from both the Commission and her mutually-exclusive opponents. Moreover, she didn't amend until after FM Montecito moved to enlarge the issues against her. At that point, Ms. Phalen had no choice but to amend her application.

Issue II-3: Phalen's Undisclosed Principal Issue

18. Shawn Phalen ostensibly learned about the availability of Channel 225A in Montecito in April 1985. She learned about it from David Tillotson. Tillotson has been since 1972, and still is, her father's, Rick Phalen's communications counsel.

19. At that time Shawn was a freshman at the University of Arizona in Tucson, Arizona. Tillotson called her at school, and told her about an opportunity to apply for an FM station in Montecito. He had never called her before, and the only time they had previously met was at a dinner that the Tillotson family and the Phalen family had in 1982 - when Shawn was only sixteen years old. Rick Phalen claims that Tillotson did not call him before he (Tillotson) called Shawn, but he couldn't explain how Tillotson obtained Phalen's phone number. At her deposition, Shawn Phalen couldn't remember whether she and her father discussed the fact that Tillotson would be calling her before the fact. But she assumes that Tillotson spoke with her father before calling her. In the initial call, Tillotson told Shawn that her female status and local residence would be important advantages if she applied for the channel. *See* Tr. 332-333, 497 and 499; FM Montecito Ex. 22, pp. 31-34, 41; and FM Montecito Ex. 23, pp. 10 and 12.

20. Shawn Phalen then called her parents to discuss the project with them. Her father, Rick Phalen, said "I though it was a great idea, and told her I thought *we* should go forward "(underlining supplied). He then called-Tillotson for an "update ... on what it was about." At the time Shawn Phalen filed for Montecito she was only a 19-year old sophomore at Arizona University. FM Montecito Ex. 23, p. 11; FM Montecito Ex. 21, pp. 8-9.

21. As of that time, and the time she was first deposed on December 21, 1987, she had never managed any business; she had never hired nor fired anyone, and had never handled the budget or payroll of an organization. When she wasn't at school, she lived at home with her parents. Her father, Rick Phalen, was paying for her college education, and she doesn't intend to pay him back. FM Montecito Ex. 2, pp. 16-17, 23-25 and 57.

22. On the other hand, Rick Phalen was and is a broadcaster. He began his career with the radio sales representative firm of Grant Webb in Chicago; then he moved to the John Pearson Company; and then he joined the Mutual Broadcasting System. FM Montecito Ex. 23, p. 6.

23. In 1969, Mr. Phalen left the "sales-rep" business to become part-owner of station KIKI, Honolulu, and the following year, he and three other people founded Western Cities Broadcasting, Inc. (Western). He was President of Western, and came to own 21.3% of the company. Between 1970 and 1985, Western acquired 8 AM and FM stations in the following markets: Las Vegas, Nevada; Tucson, Arizona; Phoenix, Arizona; Sacramento, California; and Gilroy/San Jose, California.

24. On March 15, 1985 (less than a month before Tillotson placed his initial call to Shawn Phalen) Rick Phalen and his Western group consummated the sale of their eight stations communications network, and he began looking around for other broadcast opportunities. Tr. 366-374; and FM Montecito Ex. 23, pp.6-9.

25. Shawn Phalen doesn't know what her communication's counsel's (Tillotson's) hourly charge is. But her mother, Tina Phalen, knows. Before she filed her application, Shawn Phalen never asked Tillotson to estimate what her legal expenses would be. And on the one occasion, when a question about her counsel's charges arose, it was Rick Phalen who discussed the matter with counsel. FM Montecito Ex. 21, p. 45; Ex. 22, pp. 15 and 38.

26. As previously noted, Shawn Phalen claims she first learned that the Montecito FM channel was available when Tillotson first called her in early April 1985. *See* Finding 18 *supra*. However, Tillotson's time records show that the first call to the Phalen family came on May 8, 1985, and it was to Rick Phalen. That call lasted .3 of an hour. They discussed the selection of a transmitter si Shawn's proposed station. The second recorded cal Tillotson made was also to Rick Phalen, and inc Rick Phalen's and Shawn Phalen's consulting eng Benjamin Dawson. It was Tillotson who ostensibly re mended Ben Dawson to Shawn. FM Montecito Ex. 49. At her deposition Shawn Phalen first claimed i

she who negotiated Dawson's fee. But when she was asked how she did so, she answered. "He sent me the bill, and I paid for it."[6]

27. It was Rick Phalen who arranged for a transmitter site lease. He retained James Stucko, an attorney with the Chicago law firm of Pedersen and Houpt to prepare the lease. Pedersen and Houpt have served as Rick Phalen's general counsel since October 1969, and Peer Pedersen, a name partner, who was Rick Phalen's partner in Western Cities. *See* FM Montecito Ex. 23, pp. 10-16, and Findings 23-24 *supra* In Rick Phalen's words, "I used [Stucko] at that time because my attorney, Jim Clark, was not available." Pedersen and Houpt's billing records show the client to be Richard C. Phalen, Jr., FM Montecito Ex. 25, pp. 51-52. The billing address is 1482 East Valley Road, Rick Phalen's business address.[7]

28. On at least eight occasions over the two-year period between June 1985, and July, 1987, Tillotson's law firm also sent billing statements to 1482 East Valley Road. At her December 1987 deposition Shawn Phalen testified that the listing of this address on Tillotson's statement was a "mistake." FM Montecito Ex. 21, p. 16. Later, at the hearing, Shawn admitted that she has received mail at[8] her father's business address.

29. In November 1985 (around Thanksgiving) when Shawn was home from school, the Phalen family discussed filing for the Montecito frequency. During that discussion Rick Phalen and his wife, Tina Phalen, agreed to bankroll that filing. They orally agreed to provide the money needed to prosecute the application and to construct and operate the station until it began to make a profit. They claim that the interest rate on this "loan" would be ten percent, but that Shawn wouldn't need to start repaying the loan until the station generated enough cash flow to allow repayment or until the station was sold.[9] Rick Phalen says that he will review the monthly profit and loss statements and that he might force Shawn to sell the station if the station's performance was unsatisfactory. FM Montecito Ex. 23, p. 26. It was during this same time period that Rick Phalen purportedly prepared a *pro forma* budget. That budget, if it ever existed, was lost. FM Montecito Ex. 23, pp. 21; and Ex. 22, p. 15.

30. Following that November 1985 family discussion, Rick and Tina Phalen set up a special bank account for Shawn in the Santa Barbara Bank and Trust Company to take care of the expenses relating to her Montecito application. They have paid all the expenses, $65,000 to date. (Tr. 532, 539). Rick Phalen has even paid for his daughter's airfare to Washington in order to testify at the hearings.

31. Although Shawn Phalen was a full-time student at the University, the bills relating to her application go either to her father's business address or to her parent's home at 706 Park Lane in Montecito. Tina Phalen says, "I transfer money from one of our accounts to her account, as needed." Shawn doesn't have any say in the amount transferred. It's her parents who decided that. FM Montecito Ex. 21, pp. 18, 22, 39-40.

32. The check book and register for this account are always kept at the Phalen home in Montecito regardless of where Shawn is. When Shawn is away her mother, Tina Phalen, signs Shawn's name to checks, and has done so on at least six occasions.[10] Her father has paid bills three times without her prior approval. *See* Phalen Ex. 2, p. 9; Tr. 400-401.

33. Rick Phalen not only dominated the pre-filing preparation of Shawn's application and not only has he completely dominated the financial aspects of the application, he has dominated the post-designation events surrounding that application. All correspondence from Tillotson to Shawn is carbon copies to Rick Phalen. FM Montecito Exs. 10-12, 14-15; Tr. 388. Rick Phalen has talked with Shawn about her application on numerous occasions and he had talked regularly with Tillotson about the progress of the application and Tillotson's view of the chances of winning the channel. In addition, he called Pat Maes, an investigator that he has used in Denver, to see whether he would be able to work with his daughter. *See* Phalen Ex. 3; FM Montecito Ex. 23, p. 17; Tr. 346, 379, 381; FM Montecito Ex. 21, p. 46; and FM Montecito Ex. 25 (Tillotson's time logs).

34. Several examples of such post-designation dominance will suffice. Tillotson's personal diaries show that on August 29, 1985, he told Rick Phalen about a federal court's elimination of the female preference. FM Montecito Ex. 25, p. 1; also compare Rick Phalen's deposition testimony (FM Montecito Ex. 25, pp. 1, and 17-18) and his hearing testimony (Tr. 378-380).

35. Tillotson's diaries also show that counsel's time was billed to "Shawn Phalen c/o Rick Phalen" at 1482 East Valley Road. In fact several of Tillotson's conversations with Rick Phalen were billed to his daughter's account. FM Montecito Ex. 25, pp. 1, 5, 8, 12, 13 and 49.

36. On November 20, 1985, Tillotson wrote to Ms. Phalen at Tucson to tell her about the opening of a filing window for the Montecito frequency. He sent a copy of that letter to her father. FM Montecito Ex. 8.

37. On February 5, 1986, Tillotson sent Shawn Phalen a preliminary analysis of her competing applicant's strengths and weaknesses. He sent a copy of that letter to Rick Phalen. Rick Phalen also received copies of a draft of his daughter's proposed testimony, her opposition to FM Montecito's Motion to Enlarge and the FCC caselaw on the Real-Party-in-Interest issue, at the same time they were sent to his daughter. FM Montecito Exs. 13-15.

38. After Shawn's application was designated for hearing, Rick Phalen and Shawn discussed the settlement offers that she received and he advised her about how much he would be willing to lend her so that she could buy-out the competing applicants. Rick Phalen also discussed with Shawn whether she should file a petition for reconsideration concerning the return of her application. FM Montecito Ex. 21, pp.17-18, 46.

39. At Tillotsons suggestion, Rick Phalen want to settlement meeting with Shawn in Santa Barbara in April, 1988. Ostensibly Rick Phalen went to the meeting to explain to the principals of the competing applicants why he was unwilling to lend Shawn settlement funds over a stated amount.

40. Rick Phalen put his daughter in contact with Joseph Baliss, a family friend. At the hearing Shawn indicated that she had an experienced sales manager for the station; namely, Baliss. She said that she and her father had offered Baliss a 15% equity interest in her proposed Montecito station in March 1988. Under the agreement, Baliss would buy part of his 15% interest and the remainder would be based on performance. Baliss has agreed to these terms, and Shawn intends to hire him if her application is granted. This 15% dilution of Shawn Phalen's

sole proprietorship first came out during the hearing. The Commission has never been informed of the agreement. Tr. 516-517, 519-521, 555, and 568.

41. Rick Phalen continued to exercise control over BPH-851231MO during the hearing. In fact, it was Rick Phalen (not Shawn) that aborted the June 27, 1988 settlement. At the June 27th hearing session, the parties reported that they had reached a settlement, and asked for a 30-day continuance, so they could put the papers together. *See* Tr. 304-312. The Presiding Officer had just rejected a bazaar request for a continuance that was premised on a possible settlement. *See* FCC 88M-1955, released June 23, 1988. So he was wary of the way this new settlement was constructed, and he refused to give the parties their continuance until all the evidence was adduced on Shawn Phalen's basic qualifying issues. After that was done he readily granted their motion. *See* Tr. 418-421.

42. At the June 27th hearing when it came to outlining the settlement's terms, Phalen's counsel (David Tillotson) deferred to Spirit's counsel (Eric Kravetz). Kravetz outlined the terms that had been agreed upon. Basically, he represented that Spirit and Shawn Phalen had agreed to form a new corporation, and buy out the then five remaining applicants. He further represented that his client Spirit would have the controlling interest in the new corporation (51%), and Shawn Phalen would own 49%. Rick Phalen, his wife Tina Phalen, and Shawn Phalen were present in the courtroom (along with Tillotson) at the time Kravetz made his record representations.[11] They said nothing, and it appeared to the Presiding Officer that they were satisfied that Kravetz had accurately described the agreement. Based on Kravetz's representations the Presiding Officer gave the parties a 30-day continuance to assemble and file the formal papers.

43. What everyone in the courtroom, except the Phalens, didn't know, was that the settlement Kravetz described had already aborted. *See* Tr. 426-489. And it was Rick Phalen, not Shawn, that killed the deal. Four days before Kravetz made his representations, Rick Phalen talked with Spirit's proposed financier, Bob Finklestein. He said that the agreement had to be changed; that his friend, Joe Baliss (see Finding 40 *supra*.), had to be the proposed station's sales manager; that Baliss had to be given a 10% equity interest; and that 10% had to come 5% from Spirit and 5% from Shawn Phalen. Of course, under this arrangement Spirit would no longer control the new corporation. Rick Phalen made this so-called counter-proposal to Finklestein without Shawn Phalen's knowledge or authorization. He told her about after the fact. *See* Tr. 582, 585-586, 591, 596-597, 606-607, and 610-614.[12]

44. Rick Phalen is pointedly aware of the total control he has exercised over his daughter's application, and why he has that control. At the June 27, 1989, hearing session, the following colloquy occurred. (Tr. 384, lines 3-8).

> "Judge Miller: So you have actively participated --
>
> "The Witness: As my daughter's financial adviser; in terms of how much money we are willing to settle for, yes sir. Without -- I'm the bank. You know, she's got a problem.

45. Moreover, Rick Phalen intends to continue to exercise control even after the station goes on the air. He testified (FM Montecito Ex. 23, pp. 20-26) that he " ... would be watching it, and ... would want to see monthly profit and loss statements and see how the operating is going." And he told his daughter: "you know, if the thing goes belly up -- we could have a loan agreement that says you have to meet certain levels, and if you don't the phones would be cut off ... I can't tell you to sell the radio station; it's your radio station. But if push came to shove, I could cut off the funds.

46. *Intermediate Findings*. If ever there was an undisclosed party-in-Interest to an application, Rick Phalen is one in Shawn Phalen's application. *See* Findings 18-45 *supra*. In fact, the record supports the finding that this is Rick Phalen's application - not his daughter's. Having sold a small broadcasting empire in March 1985 for a substantial sum of money, Rick Phalen immediately embarked on creating his second empire. One of the methods he's using to build that second dynasty is the comparative hearing process. And he is more than aware that being a white non-Hispanic male with a diversification demerit, his chances of prevailing in a comparative hearing for a market of any size would be slim to nil. His counsel, David Tillotson, has so advised him. He is also aware that by using his daughter as a "front," he could pick up a qualitative female enhancement credit in a comparative hearing.

47. Rick Phalen has totally dominated the prosecution of this Montecito application in every respect. It is his communications counsel, his corporate counsel, and his consulting engineer that got the application prepared and filed. He retained them, and he pays them. And it is Rick Phalen, not Shawn, that consulted with them, and told them what he needed. It is Rick Phalen's money, not Shawn's that fuels BPH-851231MO, make no mistake about it.

48. He, not Shawn, has dominated the settlement negotiations with the other parties to this case. "in terms of how much money *we* are willing to settle for ..." (underlining supplied). And the reason he has so dominated is because "[w]ithout me – I'm the bank. You know, she's got a problem." In fact, it was Rick Phalen, not Shawn, that killed the infamous June 27th 1988 settlement.

49. It is Rick Phalen, Not Shawn, that secretly restructured Shawn's "sole proprietorship: by agreeing to give his fried, Joe Baliss, a 15% equity interest in his daughter's application. Moreover, even after the station goes into operation, Rick Phalen will still exercise ultimate control. As he has told Shawn, "... if the thing goes belly up ... the phones will be cut-off ...if push comes to shove, I could cut-off the funds."

50. Perhaps Rick Phalen's communications attorney, David Tillotson, *understated* it best. On January 13, 1988, he wrote Shawn Phalen, and said this. (FM Montecito Ex. 13, pp. 1-2):

> "As we have discussed from the outset, the fact tl you are dependent upon your parents for your st port as well as for the financing of your propo station, does raise a question as to whether you w really be in control of the station if your applicati is granted. In fact, as we discussed while you w

> in Washington, you do expect to rely upon your father for much more than mere financial support if your application is granted."

51. The evidence is conclusive. Rick Phalen is an undisclosed party-in-interest in Shawn Phalen's application, the Phalens have unsuccessfully tried to hide his interest, and this mandates denial of BPH-851231MO.

Issue II-4: Phalen's False Financial Certification Issue

52. On November 20, 1985, David Tillotson wrote Shawn Phalen (with a copy of Rick Phalen). This was over a month before Shawn certified and filed her application. He advised her as follows. (FM Montecito Ex. 18):

> "One thing that you will need to do *before* the application is filed is to go through the steps necessary in order for you to certify that you have the financial ability to construct the station and operate it for three months ...[i]t is important that you go through the exercise of determining what it will cost to construct the station and operate it and that you then obtain a *written* confirmation that the money you will need to construct and operate the station will be available to you.
>
> ...
>
> Once you have arrived at the total amount of money that you will need, you should then determine whether you have that amount of money in *liquid assets* that you control. If you do not, you should obtain a *written* confirmation from your parents that they will lend you the money that you will ..." (Underlining supplied)

53. As previously noted (Finding 29 *supra.*), Shawn Phalen responded to this sound advice by entering into an *oral* agreement with her parents under which her parents *orally* agreed to fund the Montecito project. She also claims that she and her father prepared a three-year *pro forma* budget for the station, and wrote those figures on a legal pad. Needless to say, she couldn't place a copy of that budget into evidence, because somehow it got lost. However, she does know that the budget did not contain an estimate of attorney's fees to prosecute the application since Shawn has never discussed the prosecution costs with her communications counsel.[13] Nor does she even know what Tillotson's rates are. (FM Montecito Ex. 22, p. 15; and Finding 20 *supra.*; also see Phalen Ex. 2, p. 5).

54. Ms. Phalen also remembers that the lost budget contained no costs for preparing and filing the application, and while it contained a lump sum figure of $125,000 (she obtained from Ben Dawson), there was no specific cost estimate for her transmitter, antenna, transmission line, and studio equipment. *See* Phalen Ex. 2, p. 4; FM Montecito EX. 22, pp. 9-10. Nor does she know whether the $125,000 figure included labor. Montecito Ex. 22, p. 12.

55. So this then was the state of events (Findings 52-54 *supra.*), at the time Shawn Phalen filed BPH-851231MO on December 31, 1985. She had only her parents' *oral* commitment to back her financially, and if an operating budget existed it was woefully incomplete. It appears that David Tillotson's sound advice (Finding 47 *supra.*), fell on deaf ears.[14]

56. When she filed her application on December 31, 1985, she represented to the Commission " ... that sufficient net liquid assets are on hand or available from committed sources to construct and operate the requested facilities for three months without revenues." *See* FCC 88M-358 released February 11, 1988, and BPH-851231MO).

57. It wasn't until November 12, 1987,[15] that Shawn Phalen had a document in hand that indicated that her father was willing to lend her $250,000 to construct and initially operate the station, and an additional $50,000 to prosecute the application.[16] That document is in the form of a letter (not an agreement), and is signed by Rick Phalen. (FM Montecito Ex. 12). The letter was purportedly written because Tillotson had indicated that the Review Board had ruled (after Shawn's application was filed) that all financial commitments relied upon by an applicant must be reduced to writing. (Phalen Ex. 3; Phalen Ex. 2, p. 7). Rick Phalen has never specifically discussed with Shawn what the terms of repayment would be. (FM Montecito Ex. 23, pp. 19-20).

58. Moreover, the arrangements described in Rick Phalen's November 12, 1987 letter don't match the agreement described by Richard and Shawn Phalen elsewhere in their testimony; i.e., that Rick Phalen has orally agreed to lend Shawn up to 1.5 million dollars. (Phalen Ex. 2, pp. 7-8; Phalen Ex. 3, p. 6). That one still hasn't been reduced to writing.

59. When she certified her application on December 31, 1985, Shawn had never seen her father's financial statement or balance sheet. She says that she ".. . knew that he would never make a commitment of this nature, if he didn't have the resources to back it up" (Phalen Ex. 2). She also knew that her father had recently[17] sold his interest in a major broadcast chain for a very substantial profit. On the other hand, Shawn didn't know the amount of money her father realized from the sale, whether those proceeds are liquid assets or whether those proceeds were used to pay off any existing liabilities.

60. *Intermediate Findings.* Findings 52-59 *supra.*, permit certain intermediate findings on Shawn Phalen's false financial certification issue. In *Las Americas Communications, Inc.*, 1 FCC Rcd 786, 61 RR 2d 1008 (Rev. Bd. 1986), the Board reaffirmed the principle that "[t]he *sine qua non* for financial qualifications ... is written documentation." They also emphasized that " ... where individuals are providing funds, they must also support their undertakings with balance sheets or financial statements ..."

61. The Phalens were well aware that they needed such written documents to back up Shawn's financial certification. Their lawyer, David Tillotson, told them so (Finding 52 *supra.*). They simply ignored his advice (Findings 53-55 *supra.*). Consequently, when Shawn Phalen filed her application on December 31, 1985, she really didn't have any idea whether " ... sufficient net liquid assets are on hand or available from committed sources to construct and operate the requested facilities for three months without revenue." She never had a *bona fide* written operating budget prepared; she had never seen her father's financial statement or balance sheet; and she had no written commitment from her parents that they would lend her the money. She had nothing. Tillotson's good advice went

unheeded which the Phalens " ... attempted to foist upon the Commission ..." a "financial charade." *See Las Americas supra.*, at para. 11.

62. That's disqualifying conduct. It is found that Shawn Phalen lacked candor when she affirmatively certified that she was financially qualified in BPH-851231MO, and therefore she is not off it character to be a Commission licensee.

Issue II-5: Shawn Phalen's Financial Qualifications

63. Shawn Phalen and her father estimate that she will need about $100,000 to prosecute her application (Tr. 542-543);[18] that she'll need $125,000 to construct the station (Phalen Ex. 2, p. 4); and that she'll need $114,950 to operate it for three months without revenues (Phalen Ex. 2, Attachment D). So, crediting those estimates, Phalen needs at least $339,950.

64. The only *written* funds commitment that Shawn Phalen has is her father's November 12, 1987 letter. *See* Finding 57 *supra* There Rick Phalen says that he will lend her $250,000 to construct and operate the station, and an additional $50,000 to prosecute the application.[19] Thus, she would be at least $39,950 short.

65. This means that Shawn Phalen isn't financially qualified unless we can credit Rick Phalen's *oral* agreement to lend her up to $1.5 million dollars. *See* Finding 58 *supra* If that oral commitment can be accepted, it appears that Rick Phalen and his wife could make such a loan. At the present time their joint liquid assets exceed all of their liabilities, including contingent liabilities, by nearly $2.9 million. (Phalen Ex. 3, Appendix B).

66. *Intermediate Findings*. Shawn Phalen has failed to demonstrate that she's financially qualified. Rick Phalen's *oral* commitment is not good enough. *See Las Americas Communications, Inc. supra.*, paragraph 11. In fact, in *Las Americas*, an individual (Donald Lewis) was providing the funds. And this Presiding Officer was called to task for "... failing to hold Lewis to the proper standard of proof -- documentary evidence ..." He'll not make that mistake again. It is found that Shawn Phalen still doesn't have the appropriate reasonable assurance of funding from her parents, and therefore is not financially qualified.

Issue I - 1: The Standard Comparative Issue
Description of the Applicants

67. *Shawn Phalen*. Ostensibly Shawn Phalen has filed BPH-851231MO as a sole proprietorship. However, her opponents have demonstrated that that representation is false, and the sole proprietor ownership structure is a sham. They have shown that Shawn's father, Rick Phalen, is a real-party-in-interest in her application (Findings 18-51 *supra.*), and that his friend, Joe Baliss, is to be given a 15% interest in her "sole proprietorship." (Finding 49 *supra.*).

68. *Ellwood Beach Broadcasting Ltd*. Ellwood Beach is a limited partnership, formed under California law, with the following principals (Ellwood Beach Ex. 1):

CHART

Cherie Welty	General Partner	11% equity
Dana M. Hall	General Partner	9% equity
Ray M. Stanfield	Limited Partner	40% equity
Donna Cartright	Limited Partner	40% equity

69. At the time BPH-851231MS was filed, E. L. Cartright held a 40% limited partnership interest in the applicant. After his death his widow, Donna Cartright, assumed that interest. Dana Hall is Ray Stanfield's stepdaughter. Although there is an 11% - 9% equity split, Cherie Welty and Dana Hall have equal voting power. (Tr. 709, 741, and 784).

70. *Spirit Broadcasting, a California Limited Partnership*. When they filed their application on January 2, 1986, they represented that Spirit was a limited partnership; that Michael Durden would be Spirit's general partner and have an 80% equity interest; and that the two limited partners, Jimmy Turner and Martin Moss, would each own a 10% equity interest.

71. All three of these representations proved to be false. There was no limited partnership in existence on January 2, 1986. The limited partnership agreement was not executed until February 13, 1986 or thereafter; it developed that Michael Durden only holds a 72% equity interest; and Jimmy Turner, and Martin Moss each own 14% (Tr. 850, 852-853, 892, 894). Moreover, on March 5, 1991, Spirit amended their application to indicate that Michael Durden will terminate all connection with Spirit if his Mecca, California application is granted. *See* FCC 91M-842.

72. *James Evans*. James Evans has filed BPH-851231MR as an individual applicant, and sole proprietor.

Diversification of Mass Media

73. *Shawn Phalen*. Shawn Phalen asserts she has no other media interest of any sort. However, her father, Richard Phalen holds an attributable 100% of the voting shares of Western Cities Broadcasting, Inc., licensee of KQKS(FM), Longmont, Colorado (Phalen Ex. 1, p. 3; Phalen Ex. 5; and Finding 11 *supra.*). In addition, on January 16, 1991, Rick Phalen became the receiver of the following five stations: (1) KBOS(FM), Tulare, California; (2) KKAM(AM), Fresno, California; (3) KIST(AM), Santa Barbara, California; (4) KMEQ(FM), Goleta, California; and (5) KXBS(FM), Santa Poula, California. *See* FCC 91M-1075, released March 25, 1991; and *Western Cities Broadcasting, Inc.*, FCC 91M-1066, released March 25, 1991.

74. *Ellwood Beach Broadcasting Ltd*. Neither Ellwood Beach nor any of its principals have any ownership interests in any media of mass communications.

75. *Spirit Broadcasting, a California Limited Partnership*. Neither Spirit nor any of its principals have any interest in or connection with any other media of mass communications.[20]

76. *James Evans*. James Evans has no ownership interest in or connection with any other media of mass communications.

77. *Intermediate Findings*. Ellwood Beach, Spirit, and Evans are entitled to a significant diversification advantage over Shawn Phalen because of her father's media interests. *See* Finding 73 *supra*.

Best Practicable Service

78. *Comparative Coverage*. By Memorandum Opinion and Order (FCC 88M-060 released January 13, 1988), the Presiding Officer accepted a joint engineering stipulation. So the record shows " ... that five or more primary aural services are received throughout the primary coverage areas proposed in their respective applications and that

therefore, the differences in the areas and populations encompassed within their proposed primary coverage contours are not of decisional significance."

79. *Integration of Ownership With Management.* Shawn Phalen. Shawn Phalen claims a quantitative integration credit of 100%. She bases that claim on her sole ownership of BPH-851231MO, and her proposal to be the full-time manager of her proposed station.

80. That claim is rejected. Her ownership structure is a classic sham. *See* Finding 67 *supra.* [21] She is not a viable applicant worthy of integration consideration.

81. If her integration proposal were credited, Ms. Phalen would be fully integrated (at least 40 hours a week) as the proposed station's general manager. In that capacity she says that she will manage and supervise all aspects of the station's operation: that she will hire and fire all employees; that she will set personnel policy; that she will establish and implement the programming format; that she will develop the station's public service programming; and that she will oversee sales, promotions and general administration (Phalen Ex. 1, p. 1).

82. However, the record shows that Shawn Phalen can't do what she says she'll do. She lacks the practical business experience needed to run a radio station on her own. She'll need both an experienced program director and sales manager to make her station successful. (Phalen Ex. 3, pp. 9-10). She gets 0% quantitative integration.

83. Shawn Phalen was born on February 8, 1966. She lived in Montecito with her parents from August, 1980 until September 1984. Since then she has spent most of her time as a student in Tucson, Arizona. She would return to Montecito during school breaks. (Phalen Ex. 1, pp. 1-2). Upon graduation, she became a "temporary" resident of Pismo Beach, California. *See* FCC 89M-1134, released April 11, 1989.

84. From ages 12-14, she worked as a research assistant at KLUC(AM) and KMJJ(FM), Las Vegas, Nevada, stations owned and operated by her father and mother.

85. During the summers of 1985 and 1986, Ms. Phalen worked about 10 hours a week as a volunteer for Centro Familiar, a Santa Barbara social services organization. Santa Barbara is within Shawn's proposed service area. Shawn Phalen claims female enhancement.

86. *Ellwood Beach.* Ellwood Beach seeks 100% quantitative integration. They stake their claim based on their intention to integrate their two general partners, Cherie Welty and Dana M. Hall into the proposed station's day-to day operations. *See* Findings 68-69 *supra.*

87. Ellwood Beach intends to integrate Ms. Welty as the full-time (a minimum of 40 hours a week) general manager. She will have 50% of the voting power, even though she only owns an 11% equity interest. In her capacity as general manager, Ms. Welty would direct the station's operation, establish and implement station's policies, hire, fire and supervise station personnel and administer the Equal Employment Opportunity Program. (Ellwood Beach Ex. 2, pp. 2-3).

88. Cherie Welty was born in 1936 in Santa Barbara, within the proposed station's principal city contour. She attended high school and college there, and has resided in Santa Barbara all of her life except for four years.

89. Ms. Welty has extensive broadcast experience. From 1956 to 1958, she was the Assistant Operations Manager at KEYT, Santa Barbara; from 1958 to 1960 she was Traffic Manager and Assistant to the President for Radio/TV Representatives in New York City; and in 1961, she worked as a substitute Operations Manager at KEYT-TV in Santa Barbara.

90. From March 1962 to December 1981, Ms. Welty worked for KIST, Santa Barbara. She started out as a Traffic Manager/Copywriter and Operations Manager. Later, her duties expanded to Assistant Manager, Corporation Secretary, and Corporate Manager. Eventually she became Station Manager. From April to June of 1982, Ms. Welty was the part-time Operations Manager at KRUZ-FM, Santa Barbara.

91. Ms. Welty has been and is civically active. She is a member of the Santa Barbara Choral Society, and was its president for two years. Since 1950, she has been an active member of the First Congregational Church. She has been the State Manager for Alhecama Theater, a local theater group, for about ten years. She is a member of the Board (about 10 years). She has been Secretary and President (about 5 years) of the Santa Barbara Memorial Society, an organization which encourages and stresses low-cost, prepaid funerals/cremations.

92. Cherie Welty claims female enhancement.

93. Ellwood Beach also intends to integrate general partner, Dana Hall, as the full-time Sales Manager (40 hours a week) of the proposed station. In that capacity, she will manage and supervise all national, regional and local sales activities. (Ellwood Beach Ex., p. 3). Ms. Hall will have the other 50% of the voting power, (see Finding 87 *supra.*) even though she only owns a 9% equity.

94. Ms. Hall was born in 1961, in Alta Dena, California, and presently lives in Northridge, California. But she will move to Santa Barbara if Ellwood Beach's application is granted. She has broadcast experience. From February 1983 to September 1984, she was an Assistant to the Controller at KJOI-FM. Upon leaving KJOI-FM, she was an Account Executive at KNJO-FM until November 1985. From November 1985 until April 1986, she was an Account Executive for Storer Cable. Ms. Hall is presently an Account Executive for West Valley Cablevision. She will terminate her employment if Ellwood Beach is granted. Ms. Hall claims female enhancement.

95. However, Ellwood Beach's opponents have successfully demonstrated that the limited partnership structure is flawed, and that Ellwood Beach is entitled to 0% quantitative integration.[22]

96. The Ellwood Beach Limited Partnership is the creation of 40% limited partner, Ray Stanfield. As the partnership name suggests, Ellwood Beach was originally formed to apply for a new FM station at Ellwood Beach, California. When the Commission returned the Ellwood Beach application because of a technical error, they filed for the FM frequency assigned to Montecito.

97. Ray Stanfield, media broker and 50% owner of Chapman and Associates, a nationwide media broker,[23] has a extensive broadcast background. He was General Manager of KGBS, Los Angeles for four years, of WRNG, Atlanta for one and a half years, of KMBC, Kansas City, for one and half years, and of WIST, Charlotte, North Carolina for five years. He was also General Sales Manager of KLEC/KMET, Los Angeles, for two years. (Tr. 811-815).

98. Stanfield first discussed the possibility of filing for several Docket 80-90 stations with Lewis Cohen, who has been his communications counsel for 15-plus years.[24] (Tr. 815, 818-822). Even before he talked to Cohen, Stanfield

had decided to use the limited partner ownership structure. At the time he and Cohen discussed the possibility of filing for the Ellwood City Channel, Stanfield had not spoken to Cherie Welty about the application. (Tr. 822).

99. After they discussed the 80-90 possibilities, Stanfield asked Cohen to draft a limited partnership agreement. This draft "more or less" became Ellwood Beach's limited partnership agreement. Stanfield then sent a copy of that draft to his business partner, E. L. Cartright (*See* Footnote 26 *infra.*). He did this before he met with his future general partners concerning the Ellwood Beach application. (Tr. 826-827). Stanfield proposed, and he and Cartright agreed that they would each be a limited partner with a 40% equity interest, while he left it up to the then prospective general partners to decide how to split the remaining 20% among themselves. (Tr. 836).

100. Next, Stanfield contacted Cherie Welty[25] and his stepdaughter, Dana Hall, and set up a meeting at his house for July 3, 1985. He had approached Ms. Hall about radio opportunities in the Santa Barbara market about a month before that meeting. Stanfield, Welty, Hall and Lewis Cohen attended that meeting. (Tr. 665, 755). There Welty and Hall met for the first time.[26]

101. At the July 3rd meeting, Cohen presented the limited partnership agreement to Welty and Hall. (Tr. 725, 759). Although a 10% - 10% split of their equity was discussed, it was Cohen who suggested that Welty be given 11% and Hall 9%. In fact, Ms. Welty understood that Cohen was representing the limited partners and that he offered her an 11% equity interest on their behalf. (Tr. 668). The limited partnership agreement that was presented to Welty and Hall was the one that Lewis Cohen drafted, and incorporated the changes that Stanfield and E. L. Cartright had made. (Tr. 666, 719, 780, 827-828, 833).

102. The Ellwood Beach partnership agreement provides that the partnership can be dissolved at any time by "the affirmative vote of both the General Partners and Limited Partners holding in the aggregate 51% of the ownership interest of the Partnership." Since the limited partners hold an aggregate of 80%, they have the right to dissolve the partnership at any time. This effectively gives them the right to seize control of the partnership assets at any time. At dissolution, the limited partners would have an 80% interest in the assets, including the license, and therefore would control those assets.[27]

103. Based on the going (Findings 95-102 *supra.*), it's clear that we have a limited partnership created and nurtured by the 80% limited partners, a limited partnership whose destiny, by the very terms of the partnership agreement itself (Finding 102 *supra.*), lies in their hands.

104. On this point, note also what the executed limited partnership does *not* do: (1) it *doesn't* prohibit the limited partners from acting as an employee, limited contractor, or agent of the limited partnership in the company's media activities;[28] (2) it *doesn't* prohibit the limited partners from communicating with the general partners on any matters pertaining to day-to-day activities; (3) it *doesn't* prohibit limited partners from performing any services for the partnership other than lending money or acting as surety for the partnership; and (4) it *doesn't* prohibit the limited partners from becoming, in any manner actively involved in any manner, in the management or operation of the business of the partnership. *See* Ellwood Beach Ex. 1; and James Evans Proposed Finding 53.[29]

105. Finally, it must be found that all of Ellwood Beach's expenses have been paid by the two limited partners on a *pro rata* basis, and neither Ms. Welty nor Ms. Hall are required, under the partnership agreement to pay anything. (Ellwood Beach Ex. 1; Tr. 678-680).

106. In summary, the Ellwood Beach limited partnership is a creation of Ray Stanfield, an experienced broadcaster. He, along with another limited partner he recruited, have nurtured the partnership finally; the limited partnership was drafted by Stanfield's agent, Lewis Cohen, and corrected by Stanfield; that agreement places Stanfield and the other limited partner in ultimate control over the partnership's destiny; and because of the agreement the 80% limited partners are not properly insulated and must be considered active participants in the limited partnership.

107 The Review Board has had the opportunity to analyze Ray Stanfield's method-of-operation on a least one other occasion, and has branded that method-of-operation a "model sham limited partnership." *See Carta Corporation*, 5 FCC Rcd 3696 (1990), paras. 3-18. Trial Judge Edward Luton has arrived at a similar conclusion. *See Salinas Broadcasting*, 4 FCC Rcd 2762 (1989) paras. 5-18 and 68-74. Accordingly, Ellwood Beach will receive no quantitative integration whatsoever. *See Edward Royce Stoltz II*, 5 FCC Rcd 7063 (1990).

108. *Spirit Broadcasting, a California Limited Partnership.* Spirit claims 100% quantitative integration. They do so on the strength of their General Partner's, Michael Durden's, full-time participation in the day-to-day activities of the proposed FM operation. For the purpose of this analysis, Durden will be considered as owning 72% of Spirit. But see Findings 70-71 *supra.*

109. Michael Durden will be employed a minimum of 40 hours per week as Spirit's General Manager. As such, he will supervise the overall operations of the station and its staff. This will embrace all programming, sales, promotional and administrative activities.

110. Michael Durden was born in Los Angeles, on May 4, 1959. He currently lives in Los Angeles. After graduating from high school, he attended UCLA. He graduated from UCLA in June 1983 with a BA in Sociology. From 1983 to 1985 he was employed in professional football.

111. Mr. Durden retired from football in January 1985, returned to Los Angeles, and in March, 1985, joined a salaried intern program at stations KGIL/KGIL(FM), San Fernando, California. There he made sales calls, wrote commercials, and promotional spots, and conducted post-ad surveys. This was a non-supervisory position. The intern program terminated in December 1985.

112. From December 1985 - August 1986, he sold advertising space for *La Parent Magazine*. In August 1986, he became a sales representative for a radio paging service, Radio Relay/Answer Page; and nine months later he was promoted to District Sales Manager, and placed in charge of sales for Los Angeles and the surrounding area.

113. Since Durden has never lived in Santa Barbara or Montecito, he can claim no credit for civic activities there. (Tr. 839). Moreover, he has never committed to moving to Montecito or anywhere in the proposed service and reside there if Spirit's application were granted. Durden does, however, claim quantitative enhancement for being a Black male.

114. However, Spirit's claim for 100% will be rejected. Their opponents have demonstrated that Spirit's ownership structure was fatally flawed. Although the partnership agreement was purportedly amended on January 2, 1986, to reflect the 72/14/14% division of equity, the record shows it wasn't executed on that date (see Finding 71 *supra*.).[30]

115. Moreover, *assuming* that a timely partnership agreement had been executed, it wouldn't have done any good. Neither Michael Durden (the General Partner) nor Jimmy Turner and Martin Moss (the two limited partners) have ever paid the least bit of attention to it. For instance, the partnership agreement provided that each partner was to make a capital contribution when the agreement was executed. They didn't. Instead, as Durden puts it, "we [orally] agreed between ourselves to put up the money as we needed it." (Tr. 857-858).

116. Spirit has never had, and does not now have a bank account. Durden makes capital calls informally by telephone or written notes. If the limited partners provide him with any money, he co-mingles it in his personal bank account. Moreover, Spirit's two limited partners don't always respond to Durden's capital calls. About a month before the hearing, he called on each limited partner to contribute $1,000. Neither responded. So Durden had to pay his own way to Washington, D.C. for the hearing in this case. (Tr. 853, 860-861).

117. Michael Durden certified, when Spirit filed their application, that " ... sufficient net liquid assets are on hand or available from committed sources to construct and operate the requested facilities for three months without revenue." He further represented " ... that a reasonable assurance exists that all such [financial] sources have sufficient net liquid assets to meet these commitments ..."

118. When he made those representation he was relying solely on the *oral* assurances of his limited partners that "...they were good for it;"[31] i.e., that they could each come up with the $15,000 capital contribution required by Section 5.33 of Spirit's limited partnership agreement. (Tr. 861-866, 895-896). However, Durden doesn't know anything about Turner's and Moss' salaries, their liabilities, or their financial obligations. (Tr. 903-904).

119. Further, Durden can't remember ever ascertaining how much money it would take to construct and operate the station three months without revenues. (Tr. 866). The partnership hasn't had and doesn't have an accountant, and didn't prepare or file tax returns for 1986 and 1987 (Tr. 966). Section 7.1 of the partnership agreement says an income statement must be prepared. No such statement has been prepared. (Tr. 868). Nor does Durden know whether a capital account has been prepared for each partner under Section 7.2 of the agreement. (Tr. 868).

120. From the foregoing (Findings 114-119 *supra*.), it's clear that Spirit's application is a "sham." None of the three principals have shown that they have a valid and concrete legal right in a choate entity either at the time Spirit's application was filed or at the appropriate cut-off date. Moreover, all three have ignored the limited partnership agreement they finally did execute.[32] The limited partnership agreement has proven to be a meaningless document that provides no assurance with a viable ownership structure exists. Durden has co-mingled all capital contributions with his personal bank account. When he certified that Spirit's application was financially qualified, Michael Durden did not have a single corroborating financial document in his possession. He was relying solely on Turner's and Moss' *oral* assurances that they were good for it. So, the finding must be made that when Spirit filed its application on January 2, 1986, they had neither a viable ownership structure, nor a viable financial structure in place. So, instead of the 100% quantitative integration credit they claim, Spirit will be awarded 0%.

121. Moreover, and even assuming *arguendo* we could find that Spirit was a *bona fide* partnership, it appears that their General Partner, Michael Durden has abandoned the operation. *See* Finding 72 *supra*. and FCC 91M-842 released March 5, 1991.

122. *James Evans*. James Evans, the sole proprietor of BPH-851231MR, claims 100% quantitative integration. He claims that he will be the general manager of the proposed station. He says he will work at least 40 hours a week and be responsible for all areas of the station's operation including programming, sales, engineering, and administrative. (Evans Ex. 1, p. 1).

123. However, Evans has attached a time *caveat* to his 40-hour commitment. He says that once the station starts making a profit, he'll hire people to manage the station and only come to the station once in a while. On this point Evans says that if on the second anniversary of his proposed Montecito operation. (Tr. 1098-1099):

> " ... [i]t would be just absoutely wonderful if the station was in the black and was just making all kinds of money and I was able to find people that could work there and I could just go in and be on the air every once in awhile or do what ever I liked to do, that would be a dream come true.

124. That is exactly Evans' *modus operandi* with the existing businesses he owns. Evans presently owns a number of businesses. They include a site leasing company, and 50% of businesses involved in land mobile radio, paging, and specialized mobile radio (SMR). He spends less than 10 hours per week monitoring the affairs of these various businesses. (Evans Ex. 1, p. 2). Mr. Evans' typical work day consists of making some telephone calls at home, perhaps taking a tennis class, arriving at the office about 5:00 p.m., looking at messages and his mail, going to the post office and returning home (Tr. 1080). He currently spends an average of 30 hours looking for new SMR investments. (Tr. 1080). He wouldn't devote 30 hours a week to this activity if his application is granted, but he didn't say how many hours he would continue to devote to it. (Tr. 1115).

125. So we are squarely faced with a question whether James Evans should be denied quantitative integration credit because his proposal lacks permanence. Stated another way does Evans' cavalier attitude (Findings 123-124 *supra*.) toward operating his proposed radio station warrant denying him quantitative integration credit?

126. Note first that Evans says he'll work at least 40 hours a week at the proposed FM station, and that testimony stands unrebutted. Moreover, and most recently, the Commission has indicated that they are not overly concerned with applicants who view their proposed broadcast operation as merely one of several businesses they are engaged in. *See Ronald Sorenson*, FCC 91-93 released April 9, 1991, at paragraph 4. So neither will the Trial Judge be overly concerned. Stated another way any doubts we may have about the lack of permanency in

Evans' integration pledge will be resolved in his favor. So, and fully cognizant of the Commission's recent *Sorenson* holding, Evans will be awarded 100% quantitative integration instead of the 0% he was awarded the last time around.

127. James Evans, a white non-Hispanic male, was born on November 8, 1952. He has resided in Santa Barbara, a community wholly encompassed by the primary signal of the proposed station, since 1976.

128. Mr. Evans is a graduate of UCLA. He received an engineering degree in 1975. Even before he graduated he acquired an FCC First Class Radio Telephone Operator's license, and has periodically renewed it. While attending UCLA, Evans worked at the UCLA Media Center. There he set up, operated, and maintained television equipment.

129. In January 1976, Evans moved to Santa Barbara, and became a full-time operating engineer at KEYT-TV, Santa Barbara. He worked there until August, 1984. His duties included film editing, camera work, tape editing, video tape operator, technical director, and audio booth work. During his off hours at KEYT-FV, Evans also participated in the construction of Stations KGFT(FM) and KMGQ(FM). Both of those stations operate in the Montecito/Santa Barbara area.

130. Since coming to Santa Barbara, Evans has been civically active. Since 1982, he has been on the UCLA Alumni Scholarship Selection Committee. There he interviews and advises students who contemplate attending UCLA; he serves as liaison between UCLA and the local high schools; and he participates in award assemblies.

131. Evans has been a member of the Santa Barbara Jaycees since September, 1983. As a Jaycee he has been an active volunteer in the Zoo-B-Q (1983-1985), Chili Cook-Off (1986), Eastern Relays (1984), Community Fair (1984-1985), Junior Miss Pageant (1984), and Fiesta Taquito Booth (1984-1985). He also arranged for one of his companies to donate two-way radio equipment for the annual Jaycee's Community Fair. He joined the Santa Barbara Chamber of Commerce in 1985.

132. *Intermediate Integration Findings*. Because of intervening events and intervening case rulings, a somewhat different set of intermediate integration findings are warranted; i.e., different from those set out in the original Initial Decision. (FCC 89D-30, released July 25, 1989 at Finding 147).

133. Analysis of Findings 79-128 *supra*. reveals: (1) that Shawn Phalen (*assuming* she were basically qualified would be entitled to no (0%) quantitative integration Findings 79-82 *supra*.); (2) Ellwood Beach will also be awarded no (0%) quantitative integration (Findings 95-107 *supra*.). Spirit will also be awarded 0% quantitative integration (Findings 70-71 and 114-121 *supra*.); but James Evans will be awarded 100% quantitative integration (Findings 122-126 *supra*.).

Auxiliary Power

134. All four applicants propose to use auxiliary power generators at their proposed stations. Phalen Ex. 1, p. 2; Ellwood Beach Ex. 2, p. 3, and Ex. 3, p. 3; and Spirit Ex. 3; Evans Ex. 1, p. 3.

Ultimate Findings of Fact and Preliminary Conclusions of Law

1. Four applicants remain in the race for Channel 225A (92.9 kHz), Montecito, California; (1) Shawn Phalen (Phalen); (2) Ellwood Beach Broadcasting, Ltd. (Ellwood Beach); (3) Spirit Broadcasting, a California Limited Partnership (Spirit); and (4) James Evans (Evans).

2. The parties adduced evidence on six factual issues. Five of those issues were basic qualifying issues added against Shawn Phalen. The sixth was the standard comparative issue.

Shawn Phalen's Basic Qualifying Issues

3. Before we turn to the standard comparative issue (Issue I-1), we must first consider the basic qualifying issues against Shawn Phalen (Issues II-1 through II-5). For it is axiomatic that only basic qualified applicants are entitled to a comparative analysis. *See e.g. Louis Adelman*, 29 FCC 1223, 18 RR 1062 (1960) *affirmed sub. nom. Guinan* v. *Federal Communications Commission*, 297 F. 2d 782, 22 RR 2026 (1961).

4. Shawn Phalen fails to qualify under any of the five issues that have been added against her. She failed timely amend her application to reflect that her father, Rick Phalen, had acquired KQKS(FM), Longmont, Colorado. Moreover the record evidence fully justified the ultimate finding and preliminary conclusion that she deliberately tried to conceal her father's acquisition from her opponents, from the Commission, and from the public. *See* Findings 10-17 *supra*. Her feeble attempts to place the blame for not amending on her counsel are summarily rejected. *See RKO General Inc., (WAXY-FM)*, FCC 89R-34 released June 6, 1989, at paras. 47-48. So Issues II-1 and II-2 are resolved adversely to Shawn Phalen, and led to the conclusion that she is not of fit character to be a Commission licensee.

5. Similarly, Issue II-3, the undisclosed party-in-interest issue must also be resolved against Shawn Phalen. *See* Findings 18-51 *supra*. Her father, Rick Phalen, is unquestionably a real-party-in-interest in Shawn's application. More than that. The record evidence points to the conclusions that BPH-851231MO is actually Rick Phalen's application, not Shawn's. This is a classic example of a white non-Hispanic, male applicant using his daughter as a "front" in order to obtain a comparative female enhancement and avoid a comparative diversification demerit.[33]

6. Similarly, Issue II-4, the false financial certification issue must be resolved against Shawn Phalen. *See* Findings 52-61 *supra*. At the time she represented " ... that sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue," and " ... that a reasonable assurance exists that all such [financial] sources have sufficient net liquid assets to meet those commitments," Shawn Phalen knew she had to have documents in her possession that could verify those representations.

7. She knew because, just the previous month, her attorney, David Tillotson, had told her that she needed them. *See* Finding 52 *supra*. Yet she never bothered to obtain such documents. Instead, and in the fact of Tillotson's sound advice, she entered into an *oral* agreement with her father whereby her father would furnish the funds for the Montecito undertaking. In fact, it wasn't

until two years later, and over a month after this case was designated for hearing, that something resembling a written financial commitment was prepared.

8. Moreover, as the time she represented that her financial source (her father) had sufficient net liquid assets to meet her financial commitments, she had never seen his financial statement or balance sheet. So, despite Tillotson's admonition, Shawn Phalen (and her father) deliberately decided to proceed on the basis of *oral* conversations. Thus she ignored the requirement that " ... where individuals are providing funds, they must also support their undertakings with balance sheet or financial statements ..." *See Las Americas Communications, Inc.*, 1 FCC Rcd 786, 61 RR 2d 1008 (Rev. Bd. 1986).

9. Thus, we have a situation where an applicant deliberately ignored her attorneys advice. She made detailed written representations to the Commission about her financial position that she knew she could not back up. Such an insensitive approach to the Commission's standards is not conduct befitting a prospective Commission permittee. Such disregard leads to yet another independent conclusion that Shawn Phalen lacks the proper character to be an FM licensee.

10. Similarly, Issue II-5, the financial qualification issue must be resolved against Shawn Phalen. *See* Findings 63-66 *supra*. The record evidence shows that Shawn Phalen is not financially qualified unless the Presiding Officer is willing to credit her father's *oral* agreement to lend her up to $1.5 million dollars. The Presiding Officer cannot and will not do so. It would fly in the face of Commission precedent. *See Las Americas Communications, Inc., supra.*, at paragraph 11. The proper standard of proof for financial qualifications is documentary evidence. Oral promises aren't good enough. So it's concluded that Shawn Phalen hasn't shown reasonable assurance that she has the funds to construct and operate her proposal for three months without revenue. she is not financially qualified and under Issue II-5 her application must be denied.

Issue I-1: The Standard Comparative Issue

11. With the elimination of Shawn Phalen,[34] three applicants remain for comparative consideration: (1) Ellwood Beach; (2) Spirit; and (3) James Evans. These three will be analyzed under the criteria set out in the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 25 modified by subsequent Review Board and Commission decisions.

12. We will direct our analysis toward two primary objectives: (1) selecting the applicant that will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public.

13. *Diversification of Mass Media*. Turning to the first Commission primary objective, diversification, we see that it is nondecisional. Neither Ellwood Beach, Spirit, nor Evans have been assigned any diversification demerit. *See* Findings 74-76 *supra*.

14. *Best Practicable Service*. In deciding which of the remaining five applicants will offer the best practicable source to the public, we may need to consider as many as four criterion: (1) whether any applicant or applicants should be preferred because of a superior areas and populations proposal (comparative coverage); (2) the degree each will integrate their ownership into the day-to-day management of the station (Quantitative Integration); (3) the qualities each integrated owner will bring to that day-to-day management (Qualitative Integration); and (4) whether the degree of quantitative and qualitative integration each will bring is enhanced by minority and/or female ownership. Criterion 3 includes such factors as local residence, participation in civic affairs within the proposed service area, past education and business experience, past broadcast experience, and auxiliary power.

15. *Comparative Coverage*. None of the applicants are entitled to a comparative advantage because of a superior areas and populations proposal. *See* finding 78 *supra*.

16. *Quantitative Integration*. Neither Ellwood Beach nor Spirit have sustained their claims to 100% quantitative integration, and the record along with Commission precedent warrants awarding them 0% quantitative integration. *See* findings 70-71, 95-107, and 114-120 *supra*. Only James Evans has made his 100% quantitative integration claim stand up. *See* Findings 122-126 *supra*.

ULTIMATE CONCLUSION

17. Under Issue I-2, we must determine which of the four remaining applicants should be granted, if any. It's no contest. James Evans' application is demonstrably superior to the other three. He is entitled to 100% quantitative integration credits. His two closest opponents, Spirit and Ellwood Beach, are a sorry lot. They are entitled to no quantitative integration whatsoever.

18. Thus, we need not evaluate criteria 3 and 4; i.e., qualitative integration, and female and/or minority enhancements. *See New Continental Broadcasting, Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (1981); *Van Buren Community Service*, 87 FCC 2d 1018, 50 RR 2d 115 (1981); and *Cannon Point Broadcasting Co.*, 93 FCC 2d 643 (R. Bd. 1983) at 649.[35] James Evans is declared the winner.

19. Even though we aren't considering criteria 3 and 4, that doesn't mean our comparative winner, James Evans, is devoid of qualitative attributes. Evans is a local resident, and a graduate engineer with a FCC First Class Radio Telephone Operator's license. He is civically active within the proposed primary service area, and has broadcast experience. There is no reason to suspect he won't become a successful FM licensee.

SO, unless an appeal is taken from the Initial decision or the Commission reviews it on their own motion, James Evans' application (BPH-851231MR) IS GRANTED; and

The applications of Shawn Phalen (BPH-851231MO); Ellwood Beach Broadcasting Ltd. (BPH-851231MS); and Spirit Broadcasting (BPH-860102MZ) ARE DENIED.[36]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] The bulk of the findings of fact and many of the conclusions in this Supplemental Initial Decision are carried forward *verbatim* from FCC 89D-30.

[2] *See Multi-States Communications, Inc.* v. *FCC*, 590 F.2d 1117 (D.C. Cir. 1978).

[3] For organizational purposes the basic qualifying issues have been set out before the standard comparative issue and the ultimate conclusionary issue (Issue I-2).

[4] *See* 2 FCC Rcd 6072, released October 8, 1987; 53 F.R. 6199 published March 1, 1988; and FCC 88M-358, released February 11, 1988.

[5] The second Prehearing Order is FCC 88M-572, released March 1, 1988.

[6] It subsequently developed that on April 27, 1985, Shawn Phalen was involved in an automobile accident, was on medication, and was sedated, at the time Dawson was retained.

[7] On May 22, 1985, James Stucko wrote Shawn Phalen. He said, "I spoke with your father earlier today and he outlined the terms of the proposed lease arrangement for your FM license." FM Montecito Ex. 6.

[8] Shawn Phalen says that the first person who ever discussed the costs of professional services related to the application was her father in the fall of 1985. He told her he'd lend her the necessary money to pay for these services, but he didn't go into the specific costs. FM Montecito Ex. 22, pp. 35-36.

[9] Until November 12, 1987, no written document regarding this loan was available. This will be discussed *infra*., under Issues II-4 and II-5.

[10] Initially, at her deposition Shawn Phalen said that her mother had only signed her name on checks on three occasions. *See* FM Montecito Ex. 21, pp. 40-44, and 59-61.

[11] Kravetz even presented the Presiding Officer with an unsigned copy of a memorandum agreement between Spirit and Phalen. Tr. 306.

[12] Unquestionably both Shawn and Rick Phalen have abused the Commission's process. To allow Spirit's counsel to obtain a 30-day continuance under what they knew were false premises is the epitomy of such an abuse. The Presiding Officer recommends that before the Commission renews the license of KQKS, Longmont, Colorado, it should seriously consider his behavior in this case. *See* Tr. 312, lines 17-20.

[13] Shawn Phalen has already spent at least $65,000 (prior to the filing of Proposed Findings of Fact) prosecuting the application. *See* Tr. 539.

[14] Rick Phalen asserts that Tillotson later told him that a written financial agreement between he and Shawn wasn't necessary, and that was the reason one was never prepred. (Tr. 387). However, Tillotson's letter (Finding 52 *supra*.), is being credited.

[15] Three days after Shawn Phalen's opponents had notified her for deposition.

[16] But see Footnote 13 *supra*.

[17] *See* Finding 24 *supra*.

[18] That estimate may be low. *See* Footnote 13 *supra*.

[19] As previously noted in Footnote 13 *supra*., Shawn Phalen (via her parents) has already spent $65,000 prosecuting the application expenses with a lot more coming up.

[20] The father of Spirit's general partner, Michael Durden, has applied for a new FM station in San Diego, California, and is a partner in the permittee of KPBL(AM), Commerce City, Colorado (Tr. 888). Michael Durden himself has applied for new FM station in Mecca, California.

[21] Even if we were to *assume* that Phalen's claim was entitled to consideration, the most - quantitative integration she would be entitled, would be 85%. She has committed herself to giving Joe Baliss a 15% ownership interest.

[22] So Cherie Welty's 11% equity interest, and Dana Hall's 9% interest will not be credited. *See* Findings 68-69, 87 and 93 *supra*

[23] Before his death E. L. Cartwright also owned 33% of Chapman and Associates (Tr. 811-812, and Finding 69 *supra*.).

[24] In addition to his Montecito application Stanfield is also a limited partner in FM applications for Fresno and Salinas, California. Lewis Cohen also represents him in those business ventures (Tr. 818-819). In fact, Cohen found Stanfield a General Partner for the Salinas application.

[25] Stanfield had first met Ms. Welty in 1981 when he was serving as a broker for the sale of KIST, Santa Barbara. Ms. Welty worked for KIST at the time. *See* Finding 90 *supra*.

[26] E. L. Cartwright did not attend the July 3rd meeting. Ms. Welty never did meet him, and she didn't meet E. L. Cartwright's widow until January 3, 1988, after the application was filed (Tr. 665, 700, 739, and 742).

[27] *See* Spirit Proposed Finding 22, and Spirit Footnote 8.

[28] By an *undated* amendment, Ellwood Beach tried to cure this defect. But they have failed to show that they cured the defect before the final date for comparative upgrading.

[29] Conversely, and as previously noted (Finding 96 *supra*.), the limited partnership was formed for the express purpose of filing for "Ellwood Beach." And although the partnership agreement has purportedly been amended three times, that remains the purpose of the agreement, and it is that application, not the Montecito application, that the limited partners are obligated to fund. (Tr. 688-691).

[30] We're not certain when the Spirit Limited Partnership agreement was executed. At his deposition Michael Durden indicated that although he couldn't recall exactly when he signed the agreement, it was sometime after February 13, 1986. At the hearing he changed his testimony, and said he had signed the agreement on February 13, 1986 (Tr. 843-844). In any event, it was executed well after Spirit's January 2, 1986 representation in its application.

[31] It's passing strange that neither Turner nor Moss " ... were good for it" when Michael Durden made a capital call about a month before the hearing started. *See* Finding 116 *supra*.

[32] The partners: (a) didn't sign their agreement until after the application was filed; (b) ignored the requirement of written capital calls and didn't meet capital calls in any form; (c) have no bank account; (d) didn't timely make their initial capital call; (e) didnt file tax returns; (f) didn't maintain captial accounts; and (g) did not keep and issue income statements.

[33] As previously noted (see Footnote 12 *supra*.), the Presiding Officer has recommended that Rick Phalen's next renewal application for KQKS, Longmont, be set for hearing. In fact, the abuse here is so egregious that the Commission might require Rick Phalen to file an early renewal application in a manner akin to the procedure set out in *Herbert P. Michels (WAUB)*, 17 RR 557 (1958).

[34] Note that comparative findings have been made on Shawn Phalen's application. *See* Findings 67, 73, 77, 79-85, 133, and 134 *supra*. It's only comparative conclusions that aren't needed. So if an appellate body disagrees with Shawn Phalen's disqualification, no remand will be required. Stated another way, findings of fact have been made on *all* issues, and conclusions of law have been made on *all material* issues. *See WFPG, Inc.*, 33 FCC 673 (1962) at para. 13; *Alkimo Broadcating, Co.*, 30 fCC 932, 21

RR 732 (1961) at Footnote 2; *Sayger Broadcasting Co.*, 32 FCC 496, 22 RR 1059 (1962) at Footnote 7; 47 CFR 1.267(b); and 5 USC 557(c)(A).

[35] Note, however that comparative findings have been made on all four best practicable service criterion. *See* Findings 79-131 *supra*.. It's only further comparative conclusions that aren't required.

[36] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-579

In the Matter of

Petitions for Waiver of Access
Billing Requirements for Joint
Service Provision

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 1991; Released: May 20, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On October 5, 1989, the Common Carrier Bureau (Bureau) ordered all local exchange carriers (LECs) jointly providing Feature Group A (FGA) access service to enter into binding revenue-sharing agreements by October 5, 1990. Access Billing Requirements for Joint Service Provision, CC Docket No. 87-579, 4 FCC Rcd 7183 (Com.Car.Bur. 1989)(*October 5 Order*). In addition, the Order requires primary exchange carriers (PECs) involved in joint provision of FGA service to certify by October 5, 1990, that they had entered into such revenue-sharing agreements with any secondary exchange carriers (SECs) providing joint FGA service.[1] Several PECs have certified that they entered into the required revenue-sharing by the designated deadline. These PECs are listed in the Appendix to this Order. Seven PECs now seek waivers of the Bureau's October 5, 1990, deadline.[2] In this Order, for reasons discussed below, we grant these petitions for waiver for a limited amount of time.

II. BACKGROUND AND PLEADINGS

2. The establishment of rates for joint provision of access service has been a matter of controversy since the divestiture of the Bell System. *See* Investigation of Access and Divestiture-Related Tariffs, CC Docket No. 83-1145, 97 FCC 2d 1082, 1176-77 (1984). Following divestiture, the Commission required PECs and SECs to develop "meet point billing" arrangements for Feature Group C and Feature Group D access service whenever they could not agree on a single billing option. Waiver of Access Billing Requirements and Investigation of Permanent Modifications, 2 FCC Rcd 4518, 4518-19 (1987)(*1987 Order*). [3] In the *October 5 Order*, the Bureau required LECs to establish meet point billing for Feature Group B service, but refrained from making this a requirement for FGA service because of difficulties associated with collecting usage information pertinent to this service.[4] *October 5 Order*, 4 FCC Rcd at 7185. Instead, the Bureau required LECs to enter into revenue-sharing agreements for FGA service within one year of the release date of the *October 5 Order*. The Bureau also required that:

> If such an agreement has not been negotiated by the established deadline, the primary exchange carrier must provide substantial justification in a waiver request explaining what efforts have been made to secure an agreement, when those efforts were made, and why they were unsuccessful. This explanation must be certified by an officer of the primary exchange carrier.

Id. at 7186. The Bureau established no requirements for these revenue-sharing agreements, other than that the parties negotiate in good faith and develop rates that recover the costs of both the PEC and the SEC. *Id.*

3. Illinois Bell seeks an extension of the October 5, 1990, deadline for six months. Illinois Bell claims that it is close to agreement with the majority of SECs with whom it is negotiating. However, Illinois Bell accuses the Moultrie Independent Telephone Company of not working with Illinois Bell to reach a compromise. Illinois Bell Petition at 3. Illinois Bell also asserts that there is a dispute between it and independent telephone companies in Missouri over whether Special Access rates or FGA rates should apply in certain situations. *Id.* at 3-4. Southwestern Bell also claims that disputes over the applicability of FGA or Special Access rates have delayed completion of several of its joint billing agreements, and requests a 60-day extension of the October 5 deadline.[5] Southwestern Bell Petition at 1-2, and n.4.

4. Indiana Bell asserts it delayed the initiation of negotiations with SECs in its region because it was in the process of developing a method of direct measurement of FGA minutes of use. It expects to reach agreement with these SECs within three months. Indiana Bell Petition at 3-5.[6] United does not attempt to explain what efforts have been made to secure agreements with SECs in its region, when those efforts were made, or why they were unsuccessful. Rather, it asserts that it is close to agreement with its remaining SECs, and that it expects to reach agreement with these SECs within "a brief period of time." United Petition at 2-3.

5. Bell Atlantic says it has entered into agreements with all the SECs in its region except for the Roanoke & Botetourt Telephone Company (R&B). Bell Atlantic claims it has offered to share revenues with R&B based on relative number of access lines, while R&B argues that this would require it to turn over 96 percent of this revenue to Bell Atlantic. Bell Atlantic expects to reach agreement "within the next few months." Letter from J.R. Young, Vice President of Bell Atlantic, to Chief, Common Carrier Bureau, Oct. 5, 1990. GTE of the North asserts that it will be able to reach agreement with the SECs in Wisconsin, Missouri, and Indiana by April 5, 1991. Letter from J.L. Schmitt, Vice President, GTE of the North, to Secretary, Federal Communications Commission, Oct. 5, 1990 (*GTE Letter*). On February 22, 1991, GTE filed a petition for waiver of the requirements of the *October 5 Order* with respect to its SECs in Iowa and Nebraska. GTE states that, except for two SECs in Iowa, GTE does not provide FGA service jointly with any SECs in Iowa and Nebraska. GTE Petition at 2-3. GTE also states that it is seeking revenue sharing agreements with the other two SECs. *Id.* at 3.

6. Finally, US West originally requested a waiver for four weeks. On November 1, 1990, US West certified that it had completed revenue-sharing agreements with all the SECs with whom it provides FGA service except for Illinois Bell, and two independent telephone companies in Minnesota -- Arvig Telephone Company (Arvig) and Redwood County Telephone Company (Redwood). US West Supplemental Certification, Attachment A.[7]

III. DISCUSSION

7. The petitioners have had ample time to develop revenue-sharing agreements. However, the petitioners appear to have been working diligently for the past year to negotiate revenue-sharing agreements with SECs, and they have assured us that agreements with remaining SECs will be reached within a short period of time. The Bureau finds that these carriers have demonstrated good cause to warrant our waiver of the *October 5 Order* certification deadline for a period of 90 days, which we consider to be a reasonable amount of time in which to complete these agreements.[8] Therefore, all the petitioners in this proceeding have 90 days from the release date of this Order to complete their revenue-sharing agreements.[9] We fully expect that these petitioners will have completed revenue-sharing agreements by that date, and we strongly encourage them to do whatever is necessary to effectuate such agreements.

8. In its petition of February 22, 1991, GTE of the North has also shown good cause for failing to secure joint billing agreements with SECs in Iowa and Nebraska. Therefore, we grant GTE of the North a waiver of the October 5 deadline for each SEC in Iowa and Nebraska until such time that the revenues to be shared with that SEC become more than *de minimis*.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that the petitions for waiver filed by Illinois Bell Telephone Company, Indiana Bell Telephone Company, Southwestern Bell Telephone Company, US West Communications, Inc., United Telephone System Companies, Bell Atlantic Telephone Company, and GTE Service Corporation ARE GRANTED to the extent indicated above, and otherwise ARE DENIED.

10. IT IS FURTHER ORDERED that Illinois Bell Telephone Company, Indiana Bell Telephone Company, Southwestern Bell Telephone Company, US West Communications, Inc., United Telephone System Companies, and Bell Atlantic Telephone Company SHALL COMPLETE revenue-sharing agreements, as required by the *October 5 Order*, not later than August, 19, 1991, with all secondary exchange carriers with whom they jointly provide Feature Group A access service.

11. IT IS FURTHER ORDERED that GTE Service Corporation SHALL COMPLETE revenue-sharing agreements with all secondary exchange carriers in Wisconsin, Missouri, and Indiana with whom it jointly provides Feature Group A access service not later than August 19, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

APPENDIX

Carriers that have certified that they have completed revenue-sharing agreements as required:

The BellSouth Telephone Companies
New England Telephone and Telegraph Company
New York Telephone Company
Pacific Bell
Cincinnati Bell Telephone Company
Central Telephone Company[1]
Contel Corporation
Lincoln Telephone and Telegraph Company
Rochester Telephone Corporation
Southern New England Telephone Company

FOOTNOTE TO APPENDIX

[1] Centel has informated the Bureau that it does not jointly provide Feature Group A service with other LECs.

FOOTNOTES

[1] A PEC is a LEC in whose exchange the interexchange carrier (IC) obtains its point of presence (POP). A SEC is any LEC from whose exchange an IC customer may reach that IC's point of presence. The IC does not make a Feature Group A connection in the SEC's exchange. *See* Amendment of Part 69 of the Commission's Rules To Ensure Application of Access Charges to All Interstate Toll Traffic, 102 FCC 2d 1243, 1245 (1985).

[2] The PECs filing waivers (hereinafter referred to as "petitioners") are Illinois Bell Telephone Company (Illinois Bell), Indiana Bell Telephone Company (Indiana Bell), Southwestern Bell Telephone Company (Southwestern Bell), United Telephone System Companies (United), and Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Telephone Company (together, US West). Bell Atlantic Telephone Company (Bell Atlantic) and GTE Service Corporation (GTE) notified the Bureau that they were still negotiating joint billing agreements with some SECs. We will treat these notifications as waiver requests.

[3] In the *1987 Order*, the Commission enumerated three separate single billing options developed by the Meet Point Billing Task Force of the Exchange Carrier Standards Association, Inc. (ECSA). *1987 Order*, 2 FCC Rcd at 4518-19. The single billing options enabled ICs to receive and pay only one bill per month. Wherever agreement on a single billing option could not be reached, the Commission required meet point billing, in which each LEC providing a portion of the access service would bill the IC for that portion of the service individually. *Id.* at 4519.

[4] However, at that time, some LECs had entered into meet point billing arrangements for Feature Group A service. *October 5 Order*, 4 FCC Rcd at 7185 n.18.

[5] The applicability of Special Access and Feature Group A rates is an issue in an informal complaint proceeding pending before the Common Carrier Bureau. Paramount Cap Manufacturing Co. v. Ellington Telephone Co. and Southwestern Bell Telephone Co., IC-90-04929, filed June 18, 1990 (*Ellington*).

[6] Indiana Bell subsequently has sought a further extension for three additional months. Request of the Indiana Bell Telephone Company for Extension of Interim Waiver, filed Jan. 4, 1991.

[7] Concurrently, US West filed informal complaints against Arvig and Redwood. *Id.* at Attachment B. US West did not file a complaint against Illinois Bell, explaining that Illinois Bell was not identified as a SEC until September 26, 1990. *Id.* at Attachment A. Subsequently, US West completed a revenue sharing agreement with Arvig, and withdrew its complaint. Letter from L.E. Sargent, Senior Council, US West, to Chief, Informal Complaints Branch, Common Carrier Bureau, Jan. 4, 1991. The complaint filed against Redwood is still pending. The deadline for completing an agreement with Redwood is hereby suspended pending the termination of the complaint proceeding.

[8] Rules may be waived if there is "good cause" to do so. *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969). Also, if the Commission grants waivers, it must identify and articulate reasonable standards that are predictable, workable, and not susceptible to discriminatory application. Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C.Cir. 1990).

[9] These deadlines are suspended pending the completion of complaint proceedings with respect to US West, Redwood, and any LEC who can show that its failure to complete a revenue-sharing agreement is a result of a dispute over the applicability of FGA rates or Special Access rates.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-496

In the Matter of

Amendment of Part 25 of the Commission's Rules and Regulations to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communications Services — RM-4206

FIRST REPORT AND ORDER

Adopted: April 23, 1991; Released: May 21, 1991

By the Commission:

I. INTRODUCTION

1. In the *Notice of Proposed Rulemaking (Notice)* [1] in this proceeding, the Commission proposed to revise the rules governing satellite communications. [2] Our primary goal was to implement recommendations made by the joint industry-government Advisory Committee on Implementation of Reduced Orbital Spacing Between Domestic Fixed-Satellites (Advisory Committee) which was established to advise the Commission on reducing spacing between satellites to 2 degrees. [3] In addition, we also proposed in the *Notice* to codify application filing and processing procedures, to eliminate certain outdated requirements and to adopt a new application form for earth stations. In response to our *Notice*, seventy-eight entities filed comments on various aspects of the proposed rules. [4] This *First Report and Order* adopts as final rules some of the proposals set forth in the *Notice*. We defer action on other proposed rules pending further study.

2. Comments received in response to our *Notice* reflect the differences in the nature of our proposed rules. With respect to the technical and operational rules, [5] many commenters state that the rules would place a burden on licensees and questioned the rules' technical and economic feasibility. [6] Some commenters question whether standards are necessary at this time in light of the current state of the satellite industry. [7] They argue that delays caused by launch failures and by subsequent decisions of some licensees not to go forward with their planned satellite systems have resulted in slower than anticipated progress toward 2^0 orbital spacing, thus alleviating, for the present time, much of the concern about potential interference. [8] In contrast, the proposed rules codifying our licensing procedures met with general approval, [9] although many commenters suggest minor adjustments. [10]

3. Because we believe that many of the proposed technical and operational rules require further evaluation, we are deferring action on them. It has been suggested that a further Notice of Proposed Rulemaking might be appropriate [11] and we will consider that option. However, because the rules relating to applications processing together with the new form can be adopted, and implemented now, we are bifurcating this proceeding so that licensees and the Commission can benefit from the efficiencies the new rules will add to our licensing program. [12] Accordingly, this *First Report and Order* addresses only the procedural rules proposed in the *Notice*. [13]

II. Discussion

A. Domestic Receive-Only Earth Station Registration

4. Since 1979, the Commission has been moving toward

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[1] 2 FCC Rcd 762 (1987).

[2] 47 C. F. R. Part 25.

[3] *See* Establishment of an Advisory Committee on Implementation of Reduced Orbital Spacing Between Domestic Fixed-Satellites, 102 FCC 2d 390 (1985); Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. 2d (P&F) 577 (1983).

[4] A list of all commenters is attached hereto as Appendix A.

[5] These rules are primarily contained in Subpart C-Technical Standards and Subpart D-Technical Operations of the rules proposed in the *Notice*.

[6] *See, e.g.*, Comments of GTE Spacenet Corporation (GTE) which suggest we conduct an analysis of the economic effect on satellite licensees and users of any new regulations. See also Comments of Conus Communications Company Limited Partnership (CONUS) with respect to the negative effect that regulation of transportable earth stations would have on satellite newsgathering.

[7] *See, e.g.*, Comments of Home Box Office (HBO), GTE. Reply Comments of HBO.

[8] *See* Comments of GTE. But see Comments of Associated Press (AP) and Equatorial Communications Services (Equatorial) which support implementing regulations to combat interference immediately.

[9] These rules are included in Subpart B-Applications and Licenses.

[10] See, e.g., Comments of AP, M/A-Com Telecommunications, Inc. (M/A-Com) and National Broadcasting Company, Inc. (NBC). American Telephone and Telegraph Company (AT&T) cautions that our new regulations should be administered in such a way that they do not increase unreasonably the amount of paperwork required of licensees or Commission staff.

[11] *See* Reply Comments of HBO.

[12] Developments in the international satellite area may require additional changes in licensing of international transmit and receive-only earth stations. Consideration of any additional changes would be undertaken in a separate proceeding.

[13] The rules we are adopting are set out as Appendix B of this order. Included in proposed Subpart B was § 25.132, verification of earth station antenna performance standards. Because this rule will require further technical analysis in light of the comments received, we defer action until we consider the rules addressing technical and operational standards. We will not require that the manufacturer's verification be submitted pursuant to Item 17 of the new application form, Form 493, until further action is taken on proposed § 25.132. A statement by the applicant that the antenna complies with the sidelobe gain patterns specified in § 25.209(a) and (b) will be sufficient in the interim.

deregulation of domestic receive-only earth stations. [14] In this order, we continue the deregulatory process by adopting rules [15] which establish a registration program for domestic receive-only earth stations that previously were subject to our optional licensing procedures. As stated in the *Notice*, a registration program would provide receive-only operators with interference protection while offering a simpler regulatory procedure. The information required for an application for registration would be the same as is currently required for a license application but the program would eliminate the issuance of a formal license. A registration program also would obviate the need for Commission approval of assignments or transfers of control pursuant to Section 310(d) of the Communications Act. [16] Registrants would be required to submit frequency coordinations as set forth in Section 25.251 of our rules and we would keep a record of the facility registration in our data base. Changes of station operators would be reported to the Commission and recorded in the data base.

5. The comments support the proposed registration program. Several commenters, however, [17] express concern that the registration of a receive-only earth station may not afford the same protection from interference as a license. Other comments propose several changes to the *Notice* 's proposed time limitations for filings, including changing the time within which a domestic station must be constructed from six [18] to twelve months after completion of frequency coordination and a suggestion that an application for registration be submitted within six, not three, [19] months after completion of frequency coordination. Commenters state that these suggested modifications would make the receive-only time periods consistent with those proposed for transmitting stations. [20]

6. Some commenters also suggest that we eliminate or change our proposed rule terminating interference protection for receive-only stations based on infrequency of use. According to the comments, requiring a station to be used at least 50% of the time within a twelve month period, instead of the consecutive six month period in our proposed rule, [21] would better accommodate occasional use. [22] Commenters also propose placing a term of five or ten years on a registration and requiring an operator to renew a registration at the end of this term or, alternatively, to inform the Commission when it ceases operations. [23]

7. After reviewing the comments, we adopt, in substantial part, the rules establishing the registration program proposed in the *Notice*. In response to the commenters' concerns, we emphasize that a registration program will afford the same protection from interference as would a license issued under our former procedure. We have considered the time period alterations suggested by the commenters but will not extend the time within which an earth station must be constructed after coordination. [24] Because of the relative technical simplicity of the equipment, it should be possible to construct most domestic receive-only stations within six months of completion of coordination and it is important for the efficacy of the coordination process that protected stations are constructed and operating as soon as possible. In addition, we are retaining the requirement that applications for registration be submitted within three months after completion of coordination [25] to allow sufficient time for us to register a station and for the registrant to construct and begin to operate it by the required date. [26] We will, however, evaluate the registration program to determine if further adjustments are appropriate and these adjustments will be considered with the remaining issues raised by our proposed revisions to Part 25.

8. We are modifying our proposal regarding occasional use of domestic receive-only stations to reflect current industry practice. We adopt the commenters' suggestion that a station's protection should terminate only if it is used less than 50% of the time in a twelve month period. This will better accommodate operators who use their stations for occasional service, while insuring that coordinated frequencies are being used productively.

9. In response to comments of National Public Radio we will provide, on request, a letter that states that a particular earth station has been properly registered if confirmation is necessary for the registrant to receive funding. In addition, applications for registration of domestic receive-only earth stations that may have a significant environmental impact must be accompanied by an environmental assessment. Any necessary environmental processing must be completed by the Commission before construction may commence or a station will be registered. [27]

10. In response to several commenters, [28] we are adding a subsection to Section 25.131 [29] that specifies that the registration term for a domestic receive-only earth station will be ten years from the date on which the registration application was filed. At the expiration of this term, a registrant will be required to renew its registration. Applications for modification of a domestic receive-only earth station must be made in conformance with our rules on modification of station licenses. [30]

11. One commenter [31] proposes that the registration program be broadened to permit registered earth stations to receive transborder and international communications.

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[14] *See* Regulation of Domestic Receive-Only Satellite Earth Stations, 74 FCC 2d 205 (1979); Deregulation of Domestic Receive-Only Satellite Earth Stations, 104 FCC 2d 348 (1986).

[15] These rules are contained in §§ 25.131, 25.133 and 25.162.

[16] *See* 47 U. S. C. § 310(d).

[17] *See, e.g.*, Comments of Cole, Raywid & Braverman; Reply Comments of Viacom International, Inc. (Viacom); Reply Comments of HBO.

[18] *See* proposed § 25.133(d).

[19] *See* proposed § 25.162(a).

[20] *See, e.g.*, proposed § 25.133.

[21] Proposed § 25.162(c).

[22] *See* Comments of Frequency Management; Comments of Satellite Operators and Users Technical Committee (SOUTC).

[23] *See* Comments of AT&T, Ameritech Operating Companies (Ameritech)

[24] We are using the completion of coordination date as the beginning of the construction time to conform to our policy that coordination must remain current within six months of the time in which an application is filed.

[25] *See* 47 C. F. R. § 25.162(a).

[26] *See* 47 C. F. R. § 25.133(d).

[27] *See* 47 C. F. R. § 1.1312

[28] *See* Comments of National Public Radio (NPR), National Spectrum Managers Association (NSMA) and Southwestern Bell Telephone Company (Southwestern Bell).

[29] *See* 47 C. F. R. § 25.131(h).

[30] *See* 47 C. F. R. §§ 25.117, 25.131(i).

[31] *See* Comments of Arent, Fox, Kintner, Plotkin and Kahn (Arent, Fox).

We have imposed a license requirement for receive-only earth stations used for the reception of services from other countries and operating with INTELSAT and INMARSAT space stations, international separate system space stations, U.S. domestic space stations or non-U.S. space stations because of United States responsibilities under Article XIV(d) of the INTELSAT Agreement and other provisions of that Agreement and the INMARSAT Convention. The record before us is insufficient to decide whether and under what conditions current licensing requirements for international receive-only stations may be relaxed consistent with international obligations. However, further review of this issue may be desirable in a separate proceeding. [32]

B. Elimination of Construction Permits for Certain Transmitting Earth Stations

12. In order to streamline the authorization process for most transmitting earth stations, we proposed in the *Notice* to eliminate the requirement for construction permits. In the *Notice*, this proposal was limited to earth stations operating with domestic satellites, those providing INTELSAT International Business Service (IBS) and television services and those operating with separate international satellite systems. [33] Under the proposal, applicants would be allowed to proceed with construction at their own risk prior to obtaining a station license. This is permitted by the Communications Act [34] and is feasible because earth station applications are rarely mutually exclusive or judged on a comparative basis. We noted that any potential interference situations would occur only in the 4/6 GHz or 10.95-11.7 GHz frequency band because of the shared use with terrestrial services. However, cases of interference have been comparatively infrequent, and our current coordination rules provide for resolution of any interference difficulties. [35] The *Notice* stated that because there is no shared primary use of the 12/14 GHz frequency bands with terrestrial users, frequency coordination for fixed-satellite facilities operating in these bands is unnecessary. [36]

13. Commenters are divided in their responses to our proposal. Several support it because, as stated by ASC, eliminating the requirement for all transmitting earth stations will permit operators to set firm construction dates and will reduce the chance of service delays. [37] Some commenters express support for the proposal provided that the Commission, in resolving any interference problems with terrestrial operators, would give greater weight to proper completion of coordination than to economic investment arguments. [38] AT&T suggests that in order to avoid coordination problems, the Commission should require applicants to perform an interference analysis and complete coordination before beginning "at risk" construction. [39]

14. Commenters opposing our proposal are concerned that eliminating the construction permit requirement would affect the coordination process. National Spectrum Managers Association (NSMA) asserts that the thirty day public notice period before a construction permit is issued is necessary to resolve coordination problems. [40] It states that when an application is placed on public notice, frequency coordinators review it to determine if coordination is completed and if the technical data in the application matches that provided in coordination. Any discrepancies can be resolved more easily and less expensively prior to commencement of construction. NSMA states that special temporary authority (STA) should be used to accommodate pressing service needs. If the Commission decides to eliminate construction permits, it should, according to NSMA, require operators to notify other parties that coordination is complete and construction is about to begin. [41] Another commenter asserts that a construction permit serves a purpose in dealing with local zoning authorities in antenna placement proceedings. [42]

15. In reply, AP asserts that construction permits are not necessary to assure successful frequency coordination.[43] It argues that because any pre-license construction is at the applicant's own risk, there is no incentive to make a significant investment in order to persuade the Commission to grant an application. Conversely, AP argues, there is an incentive to complete frequency coordination properly prior to construction to avoid moving the antenna or making other adjustments if unresolved interference problems occur. AP asserts that eliminating the construction permit requirement would facilitate faster service to the public at lower cost because of greater planning efficiency.

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[32] We have previously found that receive-only earth stations used to receive INTELNET I services from INTELSAT space stations need not file for licenses. *See* Deregulation of Receive-Only Satellite Earth Stations Operating with the INTELSAT Global Communications Satellite System, Declaratory Ruling, RM No. 4845, FCC 86-214 (released May 19, 1986)

[33] We did not propose to eliminate the requirement for INMARSAT system and general purpose gateway INTELSAT stations or space stations or for feeder links in the radiodetermination and mobile satellite services, although we did seek comment on this possibility. *See Notice* at para. 45 and n. 43. Further, notwithstanding elimination of the construction permit requirement for earth stations operating with international satellite systems, operating authority would continue to be subject to U. S. obligations under the INTELSAT Agreement.

[34] 47 U. S. C. § 319(d) provides that a construction permit shall not be required for stations licensed to common carriers unless the Commission determines that the public interest would be served by requiring a permit. It also provides that the Commission may waive the construction permit requirement for other stations if it would be in the public interest.

[35] *See* 47 C. F. R. §§ 21.100, 21.706 and 25.203.

[36] Our current policies do not require a frequency coordination exhibit for applications to use the 12/14 GHz bands. *See* Public Notice DA 87-732 (released June 18, 1987)

[37] Comments of American Satellite Company (ASC), citing Deregulation of Receive-Only Domestic Earth Stations, 74 FCC 2d 205, 221 (1979). *See also* Comments of Frequency Management, RCA American Communications, Inc. (RCA), Wal-Mart Stores, Inc. (Wal-Mart).

[38] *See* Comments of Ameritech.

[39] Comments of AT&T

[40] Comments of NSMA.

[41] *See also* Comments of Southwestern Bell and Bell South Corporation (Bell South). While this suggestion has some merit, we believe that imposing this burden on licensees absent evidence that it is necessary is unwarranted at this time. We will monitor our licensing program under the new rules to determine if further provisions are necessary to prevent possible interference problems.

[42] *See* Comments of National Cable Television Association (NCTA)

[43] AP specifically addressed comments made by Southwestern Bell as well as by NSMA and by AT&T.

16. Other reply comments suggest that arguments regarding frequency coordination issues do not pertain to the 12/14 GHz bands and thus regulatory concerns regarding construction permits do not apply in the same manner to facilities operating in these bands. [44] GTE states that zoning considerations were insufficient reasons to retain the requirement for construction permits and the Commission could issue a construction certificate to an applicant on request if one were necessary. [45]

17. While we recognize the validity of commenters' concerns about the need for proper frequency coordination, we agree with AP that our emphasis on "at risk" pre-license construction should alleviate potential problems. Applicants for facilities in the 4/6 GHz and 10.95-11.7 GHz bands. [46] are on notice not to proceed with any construction plans prior to assuring that their operations can be successfully coordinated. Of course, applicants may continue to await completion of the licensing process, which generally is accomplished within sixty days, before constructing a facility. With respect to NSMA's assertion that technical data submitted in coordination is sometimes not the same as that provided in an application, we emphasize that construction of a station will not serve as a justification for inadequate coordination. Our policies should result in a greater effort on the part of applicants to provide correct data at the coordination stage since any adjustments necessary after construction would be at their expense.

18. We also agree with GTE that zoning problems do not justify retaining the construction permit requirement. The requirement is irrelevant in persuading local zoning authorities that antennas should be permitted at a particular site, nor is our licensing function intended to operate in this manner. [47]

19. Because the public interest benefits in increased speed and efficiency of service outweigh the concerns expressed by some commenters which can be accommodated by more careful attention to detail in the coordination process, we will hereafter eliminate the requirement for earth station construction permits as proposed by our *Notice*.

20. In addition, in response to ASC's suggestion that the construction permit requirement be eliminated for all transmitting earth stations, we have determined that multipurpose earth stations operating with INTELSAT space stations and earth stations operating with INMARSAT space stations may also be exempted. [48] With respect to multipurpose earth stations operating with INTELSAT space segment, we note that, since the time of the *Notice*, INTELSAT has revised the parameters for the INTELSAT Standard A earth stations, which are often used as multipurpose earth stations, to specify the use of smaller antennas. In addition, common ownership of multipurpose earth stations by Comsat and the U.S. international carriers through Earth Station Ownership Committees (ESOCs) has ended and the ESOCs have been dissolved. The dissolution of the ESOCs, the reduction in size of the antennas for multipurpose earth stations and INTELSAT's encouragement of the construction of more multipurpose earth stations closer to traffic centers has led to a proliferation of multipurpose earth stations that do not differ significantly from their domestic satellite counterparts. Therefore, we find that there is no longer a reason to treat multipurpose earth stations operating with INTELSAT space stations differently from earth stations operating with domestic satellites or separate international systems. We also find no significant differences in the size, operation or construction of earth stations operating with INMARSAT space stations that would distinguish them from earth stations operating with domestic, separate international systems or INTELSAT space stations in a manner that requires the continuation of a construction permit requirement. Consequently, we eliminate the requirement for construction permits for earth stations operating with INTELSAT and INMARSAT space stations.

21. Licenses for all earth station facilities will be conditioned upon the licensee filing a certificate of completion of construction and commencement of operations within 12 months of license grant. [49] This certification should include the name of the licensee, file number of the application, call sign of the antenna if issued, date of the license, date of commencement of service and certification that the antenna meets our performance standards, is operational, and will remain so until the license is cancelled. [50] Applicants are expected to comply with applicable environmental rules, [51] and, pursuant to 47 C.F.R. § 1.1312, applicants must initially ascertain whether a proposed facility may have a significant environmental impact and if so, construction may not begin if environmental processing is required. [52]

22. By eliminating the construction permit requirement, we do not intend to allow applicants to avoid their responsibilities to conform with rules relating to marking and lighting antenna structures contained in Part 17 of our rules. [53] Thus, applicants proposing antennas which are 6.10 meters or less above the ground, or no more that 6.10 meters above a man-made structure (other than an antenna tower) can begin construction without authority from the FCC. For all other antennas, applicants shall file FCC Form 854 with the Antenna Survey Branch of the Commission's Field Operations Bureau. [54] The FCC Form 854 has a tear-off portion at the bottom of the form that Antenna Survey Branch will return to the applicant and which must accompany a Form 493 application for an earth station license or registration. This policy will assure that aviation safety standards have been met while also allowing applicants the flexibility to begin construction prior to the grant of a license.

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[44] *See* Reply Comments of Wal-Mart.

[45] Reply Comments of GTE

[46] We agree with Wal-Mart that operations in the 12/14 GHz bands do not present the same coordination problems.

[47] *Cf.* Preemption of Local Zoning, 51 Fed. Reg. 5519 (February 14, 1986), 59 Rad. Reg. 2d (P&F) 1073 (1986)

[48] As proposed in the *Notice*, earth stations providing feeder links for radiodetermination and mobile satellite services will need construction permits because these services have not yet been firmly established. *See Notice* at notes 43 and 45. In answer to a question by NPR, construction permits will no longer be necessary for transportable domestic earth stations, because this exemption applies to all domestic earth stations, including those that are transportable.

[49] Section 25.133(a)(b).

[50] These requirements are set out in detail in § 25.133(b).

[51] 47 C.F.R. §§ 1.1302-1.1319.

[52] *See* Amendment of Environmental Rules, 5 FCC Rcd 2942 (1990)

[53] 47 C.F.R. Part 17.

[54] Applicants may refer to 47 C.F.R. Part 17 for further guidance.

C. Elimination of Financial Requirements

23. Our proposal to eliminate the requirement that earth station applicants demonstrate financial qualifications is universally supported. [55] As we stated in the *Notice*, scrutiny of financial qualifications has been eliminated or deemphasized in other services, including receive-only stations in the fixed-satellite service, with no apparent adverse affects. [56] We find that this requirement is unnecessary for most transmitting earth stations as well. Prompt construction and implementation of services will be ensured by "the rule requiring construction to be completed and operations commenced within a specified period of time. [57] Financial qualifications must still be demonstrated by applicants for space stations in the domestic fixed-satellite service [58] the Radiodetermination Satellite Service, [59] separate international satellite systems [60] and in the Mobile Satellite Service. [61]

D. Special Temporary Authority

24. Another proposed rule that elicited substantial comment codifies our policies regarding the grant of special temporary authorizations (STAs). [62] The proposed rule would permit grant of STAs for temporary operations and for operations that are needed immediately. Under the proposed rule, an applicant must submit all necessary technical information regarding the proposed operation and a showing that extraordinary circumstances require immediate authorization. The rule specifically states that convenience to the applicant, including marketing considerations in meeting customer service dates, is not sufficient to warrant the grant of an STA. [63] The rule further provides that requests must be submitted at least three days prior to the date of commencement of operation unless a showing is made explaining why the delay was beyond the applicant's control. [64]

25. Most of the comments received on this issue urge us to delete the statement in the proposed rule that marketing conditions are not sufficient to support an STA request. [65] Parties argue that this would interfere with a licensee's ability to provide for immediate customer need.[66] IDB asserts that the grant of STAs is necessary to allow satellite operators to provide immediate service to compete with terrestrial operators who have raised their rates considerably in what, according to IDB, are abusive pricing practices. [67]

26. The STA policy codified in proposed Section 25.119 reflects the current policy followed by our domestic facilities processing staff. On September 25, 1987, approximately nine months after the *Notice* was adopted, the staff issued a public notice [68] stating that STA requests would no longer be routinely granted to domestic satellite earth station applicants pending Commission action on their applications. The Public Notice stated that applicants are expected to file their applications sufficiently in advance of the planned service date to allow sufficient time for processing - usually sixty days. It further provided that unless an applicant can demonstrate that an STA is necessary due to circumstances beyond its control, the request will be denied. It specifically stated that the fact that an applicant wishes to begin service before its application can be processed does not constitute extraordinary circumstances.

27. Since this policy was instituted, the number of STA requests filed has dropped significantly. This has allowed our routine applications to be processed more efficiently because resources are devoted to processing underlying applications instead of STAs. [69] When an application cannot be routinely granted within sixty days, [70] the staff will, in most cases, consider a request for an STA. This approach is in line with the requirements of the Communications Act which contemplates STAs only in extraordinary situations [71] and is consistent with the approach taken in other services. [72] The need for STAs should diminish in light of our eliminating the requirement for construction permits in the fixed-satellite service. Accordingly, we adopt the rule as it was proposed, and we will continue our policy of denying domestic earth station STA requests based solely on marketing considerations. The new rule also encompasses international STA requests.

28. Commenters also question the policy on transfers and assignments of STAs as stated in proposed Section 25.118(c). [73] The proposed rule provides that no STA can be assigned or transferred and an STA must be obtained separately by any new entity that will control the facility. This prohibition is consistent with our long standing policy regarding the non-transferability of STAs. One commenter urges us to reconsider this policy for involuntary transfers because the proposed rule would require all operations under STA to cease immediately pending application for a new STA in the event of death of a principal or bankruptcy. It suggests that, at a minimum,

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[55] *See* Comments of AT&T, Ameritech, GTE, Wal-Mart.

[56] *Notice* at para. 47.

[57] 47 C. F. R. § 25.133.

[58] 47 C.F.R. § 25.391. This requirement is being retained because of the huge capital investment necessary to construct and launch a space station and because orbital locations are limited.

[59] 47 C. F. R § 25.392.

[60] Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046, 1164 (1983).

[61] *See* Mobile Satellite Service, Second Report and Order, General Docket No. 84-1234, 2 FCC Rcd 485 (1987), *reconsideration*, 4 FCC Rcd 6029 (1989).

[62] 47 C.F.R. § 25.119.

[63] 47 C.F.R. § 25.119(b).

[64] The rule provides that copies of STA requests must be sent to the Commission's Laurel Maryland field office. That office's address will be published in a Public Notice. *See* suggestion of Frequency Management.

[65] *See* Comments of Frequency Management, GTE, IDB Communications Group, Inc. (IDB), SOUTC, The Western Union Telegraph Company (Western Union), and Reply Comments of Equatorial.

[66] *See, e.g.*, Comments of GTE.

[67] Comments of IDB. IDB also states that it is appropriate for the Commission to deny unjustified STA requests.

[68] Public Notice, Report No. DS-672 (released September 25, 1987).

[69] The majority of STA requests filed since the institution of this policy have either been extensions of previously granted STAs for certain types of facilities or have been for non-routine applications that cannot be granted within sixty days.

[70] *E.g.*, Very Small Aperture Terminal (VSAT) systems.

[71] 47 U. S. C. § 309(f).

[72] *See* Revision of Part 21 of the Commission's Rules, 2 FCC Rcd 5713 (1987) at paras. 59-61.

[73] *See* Comments of Arent, Fox and Comments of IDB.

the new entity be given at least thirty days to reapply after an involuntary transfer. With respect to voluntary transfers, it was suggested that it would be more efficient to allow licensees to include a list of their STAs to be transferred along with their regular licenses in order to alleviate unnecessary burdens on the applicant as well as the Commission staff. [74]

29. Because we find no compelling reason to restrict transferability of STAs, and changing our current policy would relieve burdens on applicants and staff, we delete proposed Subsection (c) of Section 25.118. Applicants wishing to transfer or assign STAs should include these authorizations in their applications as provided in Subsection (f), now redesignated Subsection (e), of Section 25.118 and shall also include the file number of the underlying regular application, if available. The fee for the transfer or assignment of an STA shall be that designated in the "all other earth station" applications category. [75] This procedure will not impose any additional administrative burden on the processing staff and is responsive to the recommendations of licensees.

30. Two commenters suggest that we put the grant of STAs together with certain information about the station, on public notice. [76] We decline to do this. Because we have been substantially curtailing the number of STAs granted and because most STAs are reflective of an underlying application, the particulars of which will be put on public notice as part of the regular processing, a further listing of information would be duplicative and would create an unnecessary administrative burden. [77]

E. Codification of Blanket Licensing Policies

31. We have been urged by several commenters [78] to codify our blanket authorization policies for networks of small antennas operating in the 12/14 GHz frequency bands (VSATs). [79] API contends that because these policies were not specifically codified in our proposed rules, we should clarify how these networks will be licensed in the future. To avoid any possible confusion on this issue, we are adding a Subsection (c) to Section 25.115 [80] to cover a blanket authorization for VSAT networks operating with U.S. domestic satellites for domestic services.

32. We will continue to require the same basic information from VSAT applicants as is currently required by Commission policy. [81] This includes a general narrative section describing the applicant [82] and the operation of the system as well as a Form 493 for each large station[83] and for each representative type of small remote station.[84] We also require that applicants designate a point of contact where records of locations and frequency use will be maintained. [85]

F. Transborder Services

33. In our *Notice*, we proposed to eliminate, under certain circumstances, the requirement that licensees of U.S. domestic satellite earth stations modify their domestic licenses if they wish to use these stations for transborder services to or from Canada and Mexico. We proposed that it would not be necessary to modify the underlying domestic earth station license if: (1) the satellites, services and countries involved have been consulted through the INTELSAT Article XIV(d) process; and (2) the operators of U.S. satellites have received specific authorization to provide the services to the proposed locations. [86] Transborder services provided pursuant to this procedure must be provided consistent with consultations completed under Article XIV(d). After further review, we will eliminate the modification requirement only for existing earth stations that seek to provide transborder services by means of U.S. domestic satellites. We will hold in abeyance the extension of this new procedure to existing and new earth stations seeking to provide transborder services by means of non-U.S. domestic satellites until we are able to ascertain that the availability of U.S. domestic satellite capacity is being appropriately considered in the provision of transborder services among the U.S., Canada and Mexico. [87] New earth stations that are to provide *only* transborder services or domestic and transborder services by means of a mix of U.S. or non-U.S. domestic satellites will continue to be required to request and be granted licenses. [88]

34. Applications to modify existing domestic earth station licenses to add a non-U. S. domestic satellite for transborder communications and applications to construct and operate new earth stations only for the provision of transborder services via either U.S. or non-U.S. domestic satellites shall be addressed to the International Facilities Division. Applications to construct and operate new earth stations that will provide both domestic and transborder communications via U.S. domestic satellites shall be addressed to the Satellite Radio Branch. In either case, to the extent that the transborder services are provided on a common carrier basis, the applicant will also have to file a Section 214 application with the International Facilities Division.

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[74] *See* Comments of Arent, Fox

[75] *See* 47 C. F. R. § 1.1105.

[76] *See* Comments of NSMA and Southwestern Bell.

[77] See Revision of Part 21 of the Commission's Rules, 2 FCC Rcd 5713, 5720 (1987) for a discussion of listing STAs on public notice.

[78] *See* Comments of Geostar Corporation (Geostar), Schlumberger Technology Corporation (Schlumberger), The Southland Corporation (Southland), Telecommunications Committee of the American Petroleum Institute (API), and Wal-Mart.

[79] These policies were established by Declaratory Order, Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, Mimeo No. 3588, (released April 9, 1986), 51 Fed. Reg. 15067 (April 22, 1986).

[80] Geostar suggested that this was an appropriate section in which to include these procedures.

[81] *See* Public Notice, DA 89-417 (released April 19, 1989).

[82] A Form 430 is also required.

[83] Five meters or larger.

[84] Less than five meters.

[85] We confirm the understanding of Schlumberger, Southland and Wal-Mart that with respect to Section 25.161, Automatic termination of station authorization, the inoperability for more than 90 days of one antenna in a VSAT network covered by a blanket license does not terminate the authorization for the entire network

[86] Earth station licensees providing common carrier services would still be required to file Section 214 applications to provide transborder services.

[87] *See* 47 U.S.C. § 308 (1988).

[88] *See* para. 11, *supra*.

G. Form 493

35. In connection with our proposed codification of policies governing earth station applications, we determined that a new form would be useful in simplifying and clarifying our licensing process. The institution of a new form, Form 493, was universally supported. [89] Many commenters suggested minor changes. Some of these we have made while others were determined to be unnecessary. We have considered all commenters' proposals in finalizing the form we are adopting, although we will not specifically discuss all of these in the text of this order.

36. Our goal in developing this form is to make it as comprehensive as possible without being unduly complicated. Thus, we included categories for several possible uses. [90] These include a number of satellite services regulated under Part 25 [91] and several classes of stations [92] in order that one form can be used for a wide variety of satellite earth station applications. [93] This form will replace the general narrative statement and the FCC Form 403 previously required of applicants. Several questions on the new form may require applicants to submit further information in the form of exhibits. [94] In response to the suggestions of several commenters, [95] we are codifying our blanket licensing procedures and include these as a category under Item 3. [96]

37. Frequency Management and ASC urge that we delete certain items from the form. Specifically, Frequency Management would omit the request for information regarding earth station polarization and the number of high powered amplifiers. [97] ASC would omit information on the emission designator for each radiofrequency (r.f.) carrier. [98] Because this information is helpful to our Field Operations Bureau in discovering sources of interference,we decline to omit it. Our experience, particularly in cases of intentional or malicious interference, has been that detection is assisted by the ability to narrow the number of licensed facilities capable of causing the interference. Information on emission designators, station polarization and amplifier power are useful in this process.

38. In addition, we have refined the form to clarify it and to satisfy statutory requirements. [99] We are not, however, proceeding with our proposal to require submission of information to be submitted in computer readable format. [100] We may consider this option after further study and if more specific proposals for implementating such a system can be developed.

H. Miscellaneous

39. *Transfers of control.* Arent, Fox in its comments asserts that the scope of proposed Section 25.118(b) is broader than the established transfer of control standards applied in the satellite service and other services. The proposed rule would require that the licensee file an application for authority to transfer control when vested or contingent interests in the licensee are transferred. Arent, Fox states that the Communications Act does not require the Commission's approval for such transfers. We agree with Arent, Fox and delete this portion of the proposal. [101]

40. *Emergency Domestic Space Station Replacements.* Proposed Section 25.113(c) provides that licensees obtain a launch authorization before a space station can be launched and operated in orbit. While an application for launch authority of a ground spare ordinarily would be considered a new application for cut-off purposes, an exception would be made if the space station is an emergency replacement for a previously authorized space station that has been lost as a result of launch failure or a catastrophic in-orbit failure during the first year of operation. Several commenters suggest that we should permit emergency replacements for failures at any time during the satellite's design life. [102] In response to these comments, we delete the requirement that the catastrophic failure occur in the first year of operation. We will not, however, permit replacement of outmoded facilities near the end of their license term on an emergency basis. The determination of whether a failure is catastrophic, and not just a failure resulting from the end of a satellite's operational life, will be made on a case by case basis.

41. *Administrative sanctions.* Commenters also suggest changes to our proposed rule governing administrative sanctions, Section 25.160. Specifically, they urge us to delete the provisions allowing a forfeiture to be imposed for failure to comply with coordination requests and for failure to cooperate with Commission investigations. [103] They state that the Commission should not get involved in coordination discussions between licensees and that it is unclear what is meant by "cooperate" with Commission investigations.

42. With respect to compliance with coordination requests, our intention was to insure that earth station licensees provide sufficient information to enable us to complete international coordination requirements. To clarify this, we modify Section 25.160(a) to read "failure to comply with Commission requests for information needed to complete international coordination. [104] In

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[89] *See, e.g.,* Comments of IDB, M/A Com, and NBC.

[90] *See* Item 6.

[91] *See* Item 4.

[92] *See* Item 3.

[93] In several areas, Geostar suggested that we add additional specific categories. We decline to do this where a box for "other" can be checked to cover such categories, thus maintaining the concise format.

[94] *See, e.g.,* Items 22 and 23. In response to NPR's question, the number of exhibits necessary will depend on the answers to these particular questions.

[95] *See* Comments of Geostar, Wal-Mart, Southland and Schlumberger.

[96] *See* paras. 35-36, *supra.*

[97] Items 16(b) and 13(a).

[98] Item 16(c).

[99] See Item 24 which refers to compliance with Federal Aviation Administration requirements.

[100] GTE and Equatorial supported a computerized system while IDB and NPR opposed it on the ground that it would be too expensive.

[101] See discussion of this issue in Revision of Part 21 of the Commission's Rules, Order on Reconsideration 4 FCC Rcd 2287 at paras. 14-16 (1989).

[102] *See* Comments of Hughes Aircraft Company, NCTA.

[103] *See* Comments of Frequency Management, SOUTC, Western Union.

[104] We have also revised the rules by relocating the current regulation on provision of international frequency coordination information, 47 C.F.R. § 25.202(b), to a section designated Additional Information. *See* Section 25.111(b).

making this change, however, we emphasize that we expect licensees to exchange coordination information in a manner that facilitates expeditious service to the public. With respect to failure to cooperate with Commission investigations, we are also clarifying this rule to indicate that investigations covered by this provision are those related to international coordination.

43. *Public Notice Period.* In our proposed rules we specified that applications proposing certain minor changes in a facility would not normally be put on public notice. [105] Included in this category was a change in earth station location of no more than ten seconds in latitude and/or longitude. [106] Several commenters suggested that this should be altered to a change of no more than one second because any larger change can be significant in altering the interference environment. [107] In reply, Wal-Mart asserts that a public notice requirement for a one second change for stations in the 12/14 GHz bandwas excessive because there are no other co-primary users of these bands. [108] To accommodate the concerns of operators in different frequency bands, we have changed Section 25. 151(c)(6) to require public notice of changes of more than one second in the 4/6 GHz and 10. 95-11. 7 GHz bands and of more than ten seconds in the 12/14 GHz band. [109]

III. CONCLUSION

44. In this *First Report and Order* we are codifying and clarifying our licensing policies for earth station and satellite facilities as well as eliminating unnecessary regulatory requirements. In addition, the new Form 493 will increase the efficiency of our earth station licensing program and afford applicants clearer direction. The technical and operational rules proposed in our *Notice* will be fully analyzed in light of the comments received and will be addressed in subsequent orders.

Regulatory Flexibility Act - Final Analysis

45. *Need for Rules and Objective.* We have eliminated unnecessary forms, information gathering and regulatory burdens whenever possible in the Fixed Satellite Service. We have streamlined the administrative process affecting these licensees. Our objective has been to eliminate unnecessary regulations and policies and to provide service to the public in the most efficient, expeditious manner possible.

46. *Issues Raised by the Public in Response to the Initial Analysis.* We have taken into account the various issues raised by the public concerning the proposed rules. As a result of these comments we have modified our proposals as appropriate.

47. *Alternatives that would lessen impact.* We have reduced burdens whenever possible. [110] The regulatory burdens wehave retained are necessary in order to carry out our duties under the Communications Act. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities.

48. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose new and modified information collection requirements on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

IV. ORDERING CLAUSES

49. Accordingly, IT IS ORDERED that Part 25 of the Commission's Rules and Regulations is amended as specified in Appendix B, effective 30 days after publication in the Federal Register.

50. IT IS FURTHER ORDERED that FCC Form 403 is superseded by new FCC Form 493 as set forth in Appendix C, subject to review by the Office of Management and Budget. [111]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments Filed

Alascom, Inc.

American Satellite Company

American Telephone & Telegraph Company

American Uplinks, Inc.

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[105] *See* Section 25.151(c).

[106] Section 25.151(c)(6).

[107] *See, e.g.,* Comments of Ameritech. It has come to our attention in the context of an application proceeding that changes of only a few seconds can affect the potential for interference. *See, e.g.,* IDB Communications Group, Inc., 4 FCC Rcd 4560 (1989).

[108] Reply Comments of Wal-Mart.

[109] We decline to change § 25.116(b)(1), Amendments to Applications, to deem an amendment a major amendment only if it "significantly" increases the potential for interference. *See* Comments of Wal-Mart. We agree with Pacific Bell and Ameritech that the addition of the word "significantly" to this rule would make it too vague.

[110] *See, e.g.,* Registration program for receive-only earth stations, elimination of construction permit for many earth stations, elimination of financial requirements and adoption of new Form 493.

[111] OMB has not yet approved the new FCC Form 4 tentative copy of FCC Form 493 is appended to this Repo Order as Appendix C. This form is not to be used until received the approval of the Office of Management and B A Public Notice will be issued when the new form has approved and is available for use. Until that time, the e: Form 403 should be used. We delegate to the Chief, Cor Carrier Bureau, authority to issue a public notice de specific procedures to follow between the time the rul effective and the new form is available.

Ameritech Operating Companies
Andrew Corporation
Arent, Fox, Kintner, Plotkin & Kahn
Arizona Television Company
Associated Press
Association of Maximum Service Telecasters, Inc.
BellSouth Corporation
CBS, Inc.
Capitol Broadcasting Company, Inc.
Capital Cities/ABC, Inc.
Chronicle Broadcasting Company
Cole, Raywid & Braverman (on behalf of Cable Television Operators)
Communications Satellite Corporation
Conus Communications Company Limited Partnership
Cylix Communication Corporation
Equatorial Communication Services
Federal Express Corporation
Frequency Management
GTE Spacenet Corporation
Gannett Co., Inc. & The Radio-Television News Directors Association
General Electric Property Management of Colorado, Inc.
Geostar Corporation
Group W
H&C Communications, Inc.
The Hearst Corporation
Home Box Office, Inc.
Hughes Aircraft Company
Hughes Communications, Inc.
IDB Communications Group, Inc.
Interferometrics, Inc.
KSAT-TV
KUTV, Inc. and Kansas State Network, Inc.
Kelly Television Company
Nickolaus E. Leggett and Donald J. Schellhardt
M/A-Com Telecommunications, Inc.
MCI Communications Corporation
McGraw-Hill Broadcasting Company, Inc.
John P. McNally, Griffin Television Inc.
NSMA (National Spectrum Managers Association)
The National Association of Broadcasters
National Broadcasting Company, Inc.
National Cable Television Association, Inc.
National Public Radio
News 12 Long Island
Newslink, Inc.
Post-Newsweek Stations, Inc.
Public Broadcasting Service
Pulitzer Broadcasting Company
QSI Systems, Inc.
RCA American Communications, Inc.
Satellite Operators and Users Technical Committee
Satellite Transmission and Reception Specialist Company
Schlumberger Technology Corporation
Scientific-Atlanta, Inc.
Sherwin-Greenbert Productions, Inc.
The Southland Corporation
Southwestern Bell Telephone Company
Telecommunications Committee of the American Petroleum Institute
U. S. Satellite Corporation, Inc.
Viacom International, Inc.
WSVN/NBC
WTVJ Television
WVUE-TV
The Wall Street Journal
Wal-Mart Stores, Inc.
The Western Union Telegraph Company

Reply Comments Filed

American Telephone & Telegraph Company
The Ameritech Operating Companies
The Associated Press
CBS, Inc.
Conus Communications Company Limited Partnership
Equatorial Communication Services (corrected: 7/28/87)
GTE Spacenet Corporation
Gannett Co., Inc. & Radio-Television News Directors Association
Geostar Corporation
Home Box Office, Inc.
Hughes Communications, Inc.
Knight-Ridder Broadcasting, Inc.
Media General Broadcasting, Inc.
Media General Broadcast Group, Inc.
National Association of Broadcasters
Pacific Bell
RCA American Communications, Inc.
Satellite Operators and Users Technical Committee
Schlumberger Technology Corporation
The Southland Corporation
VideoIndiana, Inc.
Vitalink Satellite, Inc.

WBNS TV, Inc.

Wal-Mart Stores, Inc.

APPENDIX B

Part 25 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations) is amended as follows:

1. The Table of Contents for Part 25 is revised to read as follows:

PART 25 - SATELLITE COMMUNICATIONS

Subpart A - General

Sec.

25.101 Basis and Scope.
25.102 Station authorization required.
25.103 Definitions.
25.104 Preemption of local zoning of earth stations.
25.105-
25.108 [Reserved]
25.109 Cross-reference.

Subpart B - Applications and Licenses

GENERAL APPLICATION FILING REQUIREMENTS

25.110 Filing of applications, fees, and number of copies.
25.111 Additional information.
25.112 Defective applications.
25.113 Construction permits.
25.114 Applications for space station authorizations.
25.115 Applications for earth station authorizations.
25.116 Amendments to applications.
25.117 Modification of station license.
25.118 Assignment or transfer of control of station authorization.
25.119 Application for special temporary authorization.
25.120 License term and renewals.

EARTH STATIONS

25.130 Filing requirements for transmitting earth stations.
25.131 Filing requirements for receive-only earth stations.
25.132 [Reserved]
25.133 Period of construction; certification of commencement of operation.

SPACE STATIONS

25.140 Qualifications of Domestic Satellite Space Station Licensees.
25.141 Licensing provisions for the Radiodetermination Satellite Service.

PROCESSING OF APPLICATIONS

25.150 Receipt of applications.
25.151 Public notice period.
25.152 Dismissal and return of applications.
25.153 Repetitious applications.
25.154 Opposition to applications and other pleadings.
25.155 Mutually exclusive applications.
25.156 Consideration of applications.

FORFEITURE, TERMINATION, AND REINSTATEMENT OF STATION AUTHORIZATION

25.160 Administrative sanctions.
25.161 Automatic termination of station authorization.
25.162 Cause for termination of interference protection.
25.163 Reinstatement.

Subpart C - Technical Standards

25.201 Definitions.
25.202 Frequencies, frequency tolerance and emission limitations.
25.203 Choice of sites and frequencies.
25.204 Power limits.
25.205 Minimum angle of antenna elevation.
25.206 Station identification.
25.207 Cessation of emissions.
25.208 Power Flux density limits.
25.209 Antenna performance standards.
25.251 Special requirements for coordination.
25.252 Maximum permissible interference power.
25.253 Determination of coordination distance for near great circle propagation mechanisms.
25.254 Computation of coordination distance contours for propagation modes associated with precipitation scatter.
25.255 Guidelines for performing interference analyses for near great circle propagation mechanisms.
25.256 Guidelines for performing interference analyses for precipitation scatter modes. [Reserved]

Subpart D - [Reserved]
Subpart E - Developmental Operations

25.300 Developmental authorization.

25.308 Automatic Transmitter Identification System.

Subparts F-G [Reserved]

Subpart H - Authorization to Own Stock in the Communications Satellite Corporation

25.501 Scope of this subpart.

25.502 Definitions.

25.503-

25.504 [Reserved]

25.505 Persons requiring authorization.

25.506-

25.514 [Reserved]

25.515 Method of securing authorization.

25.516-

25.519 [Reserved]

25.520 Contents of applications.

25.521 Who may sign applications.

25.522 Full disclosures.

25.523 Form of application, number of copies, fees, etc.

25.524 [Reserved]

25.525 Action upon applications.

25.526 Amendments.

25.527 Defective applications.

25.528-

25.529 [Reserved]

25.530 Scope of authorization.

25.531 Revocation of authorization.

2. The authority citation for Part 25 continues to read as follows:

AUTHORITY: §§ 25.101 to 25.531 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply secs. 101-404, 76 Stat. 419-427; 47 U.S.C. 701-744.

3. In Section 25. 101, paragraph (a) is revised to read as follows:

§ 25.101 Basis and scope.

(a)The rules and regulations in this part are issued pursuant to the authority contained in Section 201(c)(11) of the Communications Satellite Act of 1962, as amended, Section 501(c)(6) of the International Maritime Satellite Telecommunications Act, and Titles I through III of the Communications Act of 1934, as amended.

* * * * *

4. A new Section 25.102 is added to read as follows:

§ 25.102 Station Authorization Required

(a) No person shall use or operate apparatus for the transmission of energy or communications or signals by space or earth stations except under, and in accordance with, an appropriate authorization granted by the Federal Communications Commission.

(b) Protection from impermissible levels of interference to the reception of signals by earth stations in the Fixed-Satellite Service from terrestrial stations in a co-equally shared band is provided through the authorizations granted under this Part.

5. Sections 25.105, 25.106, 25.107, and 25.108 are added and reserved.

6. A new Section 25.109 is added to read as follows:

§ 25.109 Cross-reference

The space radiocommunications stations in the following services are not licensed under this Part:

(a) Amateur Satellite Service, see 47 CFR 97.

(b) Direct Broadcasting Satellite Service, see 47 CFR 100; and

(c) Ship earth stations in the Maritime Mobile Satellite Service, see 47 CFR 83.

7. Subpart B is removed and a new Subpart B is added to read as follows:

Subpart B - Applications and Licenses [GENERAL APPLICATION FILING REQUIREMENTS]

§ 25.110 Filing of applications, fees, and number of copies.

(a) Standard application forms applicable to this Part may be obtained by writing Federal Communications Commission, Forms Distribution Center, 2803 52nd Ave., Hyattsville, MD 20781 or calling (202) 632-FORM.

(b) Applications for satellite radio station authorizations governed by this Part and requiring a fee shall be mailed or hand-delivered to the location specified in Part 1, Subpart G of this title. All other applications shall be submitted to the Secretary, 1919 M Street, N.W., Federal Communications Commission, Washington, D.C. 20554. Applications for facilities used for fixed-satellite service between the United States and foreign points should be addressed to the attention of Chief, International Facilities Division. All other applications should be addressed to the attention of Chief, Satellite Radio Branch.

The following applications should be addressed to the attention of Chief, International Facilities Division:

1) All applications for facilities utilizing the INTELSAT system, the INMARSAT system and for separate international satellite systems;

2) Applications for facilities utilizing any satellites, other than U.S. domestic satellites, for the provision of fixed satellite service between the United States and foreign points;

3) Applications proposing to construct and operate new earth stations for provision of transborder services only via U.S. and non-U.S. satellites.

(c) All correspondence and amendments concerning an application shall clearly identify the satellite radio service, the name of the applicant, station location, the call sign or other identification of the station, and the file number of the application involved (if available).

(d) Except as otherwise specified, all applications, amendments, and correspondence shall be submitted in triplicate, including exhibits and attachments thereto. All matters relating to space station applications shall be submitted as an original and nine copies.

(e) The original copy of the application shall be signed as specified in § 1.743 of this Chapter, and shall supply the information prescribed by this Part for the particular authorization requested. All other copies may be conformed.

(f) Each application shall be accompanied by the appropriate fee, specified by, and submitted in accordance with, Subpart G of Part 1 of this Chapter.

§ 25.111 Additional information.

(a) The Commission may request from any party at any time additional information concerning any application, or any other submission or pleading regarding an application, filed under this Part.

(b) Applicants, permittees and licensees of radio stations governed by this Part shall provide the Commission with all information it requires for the Advance Publication, coordination and notification of frequency assignments pursuant to the international Radio Regulations and consultations required by Article XIV of the INTELSAT Agreement and Article 8 of the INMARSAT Convention. This information includes, but is not limited to, that specified in Appendices 3 and 4 of the Radio Regulations (Geneva 1979). No protection from interference caused by radio stations authorized by other Administrations is guaranteed unless coordination procedures are timely completed or, with respect to individual administrations, by successfully completing coordination agreements. Any radio station authorization for which coordination has not been completed may be subject to additional terms and conditions as required to effect coordination of the frequency assignments with other Administrations.

§ 25.112 Defective applications.

(a) An application will be unacceptable for filing and will be returned to the applicant with a brief statement identifying the omissions or discrepancies if:

(1) The application is defective with respect to completeness of answers to questions, informational showings, internal inconsistencies, execution, or other matters of a formal character; or

(2) The application does not substantially comply with the Commission's rules, regulations, specific requests for additional information, or other requirements.

(b) Applications considered defective under paragraph (a) of this section may be accepted for filing if:

(1) The application is accompanied by a request which sets forth the reasons in support of a waiver of (or an exception to), in whole or in part, any specific rule, regulation, or requirement with which the application is in conflict;

(2) The Commission, upon its own motion, waives (or allows an exception to), in whole or in part, any rule, regulation or requirement.

(c) If an applicant is requested by the Commission to file any additional information or any supplementary or explanatory information not specifically required in the prescribed application form or these rules, a failure to comply with the request within a specified time period will be deemed to render the application defective and will subject it to dismissal.

§ 25.113 Construction permits

(a) Except as provided in paragraph (b) or in § 25.131, construction permits must be obtained for all fixed or temporary fixed earth stations and for all space station facilities governed by this Part. Simultaneous application for a construction permit and station license may be made for all earth station and space station facilities governed by this Part.

(b) Construction permits are not required for domestic satellite earth stations, for satellite earth stations that operate with INTELSAT or INMARSAT space stations, or for earth stations that operate with international space stations licensed pursuant to Establishing of Satellite Systems Providing International Communications, 50 FR 42266 (October 18, 1985), 101 FCC 2d 1046 (1985).Construction of such stations may commence prior to grant of a license at the applicant's own risk. Applicants must comply with the provisions of 47 CFR § 1.1312 relating to environmental processing prior to commencing construction.

(c) Applicants for earth station antenna facilities exceeding 6.10 meters above ground or existing manmade structure, *see* 47 CFR Part 17, must file an FCC Form 854 with the Antenna Survey Branch and be notified of FCC clearance before beginning construction. A copy of this notification must accompany an application for earth station license or registration for antennas exceeding 6.10 meters above ground or existing manmade structures.

(d) In addition to the construction permit required by paragraph (a) above, a launch authorization must be applied for and granted before a space station may be launched and operated in orbit. Request for launch authorization and station license may be included in the application for space station construction permit. A

launch authorization and station license may also be requested at any time for a space station constructed as an on-ground spare satellite. However, an application for authority to launch and operate an on-ground spare domestic satellite will be considered to be a newly filed application for cut-off purposes, except where the space station to be launched is determined to be an emergency replacement for a previously authorized space station which has been lost as a result of a launch failure or a catastrophic in-orbit failure.

§ 25.114 Applications for space station authorizations.

(a) A comprehensive proposal shall be submitted for each proposed space station in narrative form with attached exhibits as described in paragraph (c). A separate application should be filed for each space station to be constructed. If an applicant is proposing more than one space station, information common to all space stations may be submitted in a consolidated system proposal. This information may be incorporated by reference in the individual space station applications.

(b) Each application for a new or modified space station authorization must constitute a concrete proposal for Commission evaluation, although the applicant may propose alternatives that increase flexibility in accommodating the satellite in orbit. Each application must also contain the formal waiver required by Section 304 of the Communications Act, 47 C.F.R. § 304. The technical information for a proposed satellite radio system need not be filed on any prescribed form but should be complete in all pertinent details. Applications should be captioned in a manner that clearly distinguishes individual satellites within the applicant's system. The format of the applications should conform to the specifications of § 1.49 of this Chapter.

(c) The following information shall be contained in the separate applications:

(1) Name, post office address and telephone number of the applicant.

(2) Name, address and telephone number of the person(s), including counsel, to whom inquiries or correspondence should be directed.

(3) Type of authorization requested (e.g., construction permit, launch authority, station license, modification of authorization).

(4) General description of overall system facilities, operations and services.

(5) Radio frequencies and polarization plan (including beacon, telemetry, and telecommand functions), center frequency and polarization of transponders (both receiving and transmitting frequencies), emission designators and allocated bandwidth of emission, final amplifier output power (identify any net losses between output of final amplifier and input of antenna and specify the maximum EIRP for each antenna beam), identification of which antenna beams are connected or switchable to each transponder and TT&C function, receiving system noise temperature, the relationship between satellite receive antenna gain pattern and gain-to-temperature ratio and saturation flux density for each antenna beam (may be indicated on antenna gain plot), the gain of each transponder channel (between output of receiving antenna and input of transmitting antenna) including any adjustable gain step capabilities, and predicted receiver and transmitter channel filter response characteristics.

(6) Orbital location, or locations if alternatives are proposed, requested for the satellite, the factors which support such an orbital assignment, the range of orbital locations from which adequate service can be provided and the basis for determining that range of orbital locations, and a detailed explanation of all factors that would limit the orbital arc over which the satellite could adequately serve its expected users.

(7) Predicted space station antenna gain contour(s) for each transmit and each receive antenna beam and nominal orbital location requested. These contour(s) should be plotted on an area map at 2 dB intervals down to 10 dB below the peak value of the parameter and at 5 dB intervals between 10 dB and 20 dB below the peak values, with the peak value and sense of polarization clearly specified on each plotted contour.

(8) Estimated number and geographic distribution of earth stations, and description of proposed arrangements for access to the system between the premises of the users and the earth stations for domestic satellites only.

(9) A description of the types of services to be provided, the estimated demand for these services, and the areas and entities to be served, including a description of the transmission characteristics and performance objectives for each type of proposed service, details of the link noise budget, typical or baseline earth station parameters, modulation parameters and overall link performance analysis (including an analysis of the effects of each contributing noise and interference source). An estimate of transponder capacity under each of the proposed operating conditions must also be supplied.

(10) Accuracy with which the orbital inclination, the antenna axis attitude, and longitudinal drift will be maintained.

(11) Calculation of power flux density levels within each coverage area and of the energy dispersal, if any, needed for compliance with § 25.208.

(12) Launch vehicles and arrangements for procuring launch services.

(13) Arrangements for tracking, telemetry, and control.

(14) Physical characteristics of the space station including weight and dimensions of spacecraft, detailed mass (on ground and in-orbit) and power (beginning and end of life) budgets, and estimated operational lifetime and reliability of the space station and the basis for that estimate.

(15) A detailed description of the capabilities, if any, of each proposed domestic satellite to provide service to Alaska, Hawaii, and/or Puerto Rico/Virgin Islands.

(16) If the request is for additional or replacement satellites, detailed information on the historical use of the system transponder-by-transponder and on a year-by-year basis, together with a projection of the types and amount of services, including restoral or protection requirements, for each additional satellite on a year-by-year and transponder-bytransponder basis over the estimated lifetime of the satellite(s).

(17) A detailed schedule of the estimated investment costs and operating costs for the proposed system by year, including annual depreciation, maintenance and operating costs, and the basis on which such costs are cal-

culated. Estimated annual revenue requirements should be provided in detail on a year-by-year basis over the estimated design lifetime of the satellites, including any pre-operational periods.

(18) Detailed information demonstrating the financial qualifications of the applicant to construct and launch the proposed satellites. Applications for domestic satellite systems shall provide the financial information required by § 25.140(b)-(e). Applications for international satellite systems shall provide the information required by Establishing of Satellite Systems Providing International Communications, 50 FR 42266 (October 18, 1985), 101 FCC 2d 1046 (1985).

(19) Legal qualifications of applicant. FCC Form 430 (Licensee Qualification Report). If FCC Form 430 is already on file, indicate date, radio service and file number of most recent filing.

(20) A clear and detailed statement of whether the space station is to be operated on a common carrier basis, or whether noncommon carrier transactions are proposed. If noncommon carrier transactions are proposed, describe the nature of the transactions and specify the number of transponders to be offered on a noncommon carrier basis.

(21) Dates by which construction will be commenced and completed, launch date, and estimated date of placement into service.

(22) Public interest considerations in support of grant.

(23) Applications for authorizations for domestic fixed-satellite space stations shall also include the information specified in § 25.140.

(24) Applications for international fixed-satellite authorizations shall also provide all information necessary to comply with the policies and procedures set forth in Establishing of Satellite Systems Providing International Communications, 50 FR 42266 (October 18, 1985), 101 FCC 2d 1046 (1985).

(25) Applications for authorizations in the Radiodetermination Satellite Service shall also include the information specified in § 25.141.

(26) Applications for authorizations in the Mobile Satellite Service shall also provide all information necessary to comply with the policies and procedures set forth in Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service, 52 FR 4017 (February 9, 1987), 2 FCC Rcd 485 (1987).

§ 25.115 Application for earth station authorizations.

(a) Transmitting earth stations. Except as provided under § 25.113(b), Commission authorization must be obtained for authority to construct and/or operate a transmitting earth station. Applications shall be filed on FCC Form 493 (Application for Authorization of Earth Station or for Modification of Station License) and include the information specified in §25.130.

(b) Receive-only earth stations. Applications to license or register receive-only earth stations shall be filed on FCC Form 493 and conform to the provisions of § 25.131.

(c) Large Networks of Small Antennas operating in the 12/14 GHz bands with U. S. domestic satellites for domestic services. Applications to license small antenna network systems operating in the 12/14 GHz frequency band under blanket operating authority shall include the following:

(1) A general narrative section describing the applicant and the overall system operation,

(2) A Form 430 (Licensee Qualification Report),

(3) A Form 493 for each large (5 meters or larger) hub station operating with the network,

(4) A Form 493 for each representative type of small antenna (less than 5 meters), and

(5) A designation of a point of contact where records of location and frequency use will be maintained.

§ 25.116 Amendments to applications.

(a) Unless otherwise specified, any pending application may be amended until designated for hearing, a public notice is issued stating that a substantive disposition of the application is to be considered at a forthcoming Commission meeting, or a final order disposing of the matter is adopted by the Commission.

(b) Major amendments submitted pursuant to paragraph (a) are subject to the public notice requirements of §25.151. An amendment will be deemed to be a major amendment under the following circumstances:

(1) If the amendment increases the potential for interference, or changes the proposed frequencies or orbital locations to be used.

(2) If the amendment would convert the proposal into an action that may have a significant environmental effect under § 1.1307 of this Chapter.

(3) If the amendment specifies a substantial change in beneficial ownership or control (*de jure* or *de facto)* of an applicant such that the change would require, in the case of an authorized station, the filing of a prior assignment or transfer of control application under § 310(d) of the Communications Act, provided however, that the change would not be considered major where it merely amends an application to reflect a change in ownership or control of the station that had been previously approved by the Commission.

(4) If the amendment, or the cumulative effect of the amendment, is determined by the Commission otherwise to be substantial pursuant to § 309 of the Communications Act.

(c) Any application will be considered to be a newly filed application if it is amended by a major amendment (as defined by paragraph (b)) after a "cut-off" date applicable to the application, except under the following circumstances:

(1) The amendment resolves frequency conflicts with authorized stations or other pending applications but does not create new or increased frequency conflicts;

(2) The amendment reflects only a change in ownership or control found by the Commission to be in the public interest and, for which a requested exemption from a "cut-off" date is granted;

(3) The amendment corrects typographical, transcription, or similar clerical errors which are clearly demonstrated to be mistakes by reference to other parts of the application, and whose discovery does not create new or increased frequency conflicts; or

(4) The amendment does not create new or increased frequency conflicts, and is demonstrably necessitated by events which the applicant could not have reasonably foreseen at the time of filing.

(d) Any amendment to an application shall be signed and submitted in the same manner, and with the same number of copies, as was the original application.

§ 25.117 Modification of station license.

(a) Except as provided, no modification of a radio station governed by this part which affects the parameters or terms and conditions of the station authorization shall be made except upon application to and grant of such application by the Commission. Licensees of U.S. domestic satellite earth stations proposing transmit and/or receive communications with U.S. domestic satellites for the provision of transborder services need not apply for modifications of their licenses provided that: (1) consultations pursuant to Article XIV(d) of the INTELSAT Agreement have been completed for the satellites, services and countries involved in the transborder services; and (2) the operators of the U.S. domestic satellites have received specific authorization to provide the services to the proposed locations.

(b) Applications for modification of an earth station license to add, change or replace transmitters or antenna facilities conforming to § 25.209 will be considered to be minor modifications if the particulars of operations remain unchanged and frequency coordination is not required, provided however, that the maximum power and power density delivered into any antenna at the earth station site shall not exceed the values calculated by subtracting the maximum antenna gain specified in the license from the maximum authorized e.i.r.p. and e.i.r.p. density values.

(c) Applications for modification of earth station authorizations shall be submitted on FCC Form 493 except as set forth in paragraph (e).

(d) Applications for modifications of space station authorizations shall be filed in accordance with §25.114, but only those items of information listed in §25.114(c) that change need to be submitted provided the applicant certifies that the remaining information has not changed.

(e) Any application for modification of authorization to extend a required date of completion (e.g., begin construction, complete construction, launch, bring into operation) shall be filed on FCC Form 701 (Application for Additional Time to Construct). The application must include a verified statement from the applicant:

(1) that states the additional time is required due to unforeseeable circumstances beyond the applicant's control, describes these circumstances with specificity, and justifies the precise extension period requested; or

(2) that states there are unique and overriding public interest concerns that justify an extension, identifies these interests and justifies a precise extension period.

§ 25.118 Assignment or transfer of control of station authorization.

(a) No station license, nor any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation or any other entity holding such license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby.

(b) For purposes of this section, transfers of control requiring Commission approval shall include any and all transactions that:

(1) change the party controlling the affairs of the licensee, or

(2) affect any change in a controlling interest in the ownership of the licensee, including changes in legal or equitable ownership.

(c) Assignment of license. FCC Form 702 (Application for Consent to Assignment of Radio Station Construction Permit or License for Stations in Services Other than Broadcast) shall be submitted to assign voluntarily (as by, for example, contract or other agreement) or involuntarily (as by, for example, death, bankruptcy, or legal disability) the station authorization. In the case of involuntary assignment (or transfer of control), the applications should be filed within 10 days of the event causing the assignment (or transfer of control). FCC Form 702 shall also be used for non-substantial (*pro forma)* assignments. In addition, FCC Form 430 shall be submitted by the proposed assignee of a transmitting station unless the assignee has a current and substantially accurate report on file with the Commission.

(d) Transfer of control of corporation holding a license. FCC Form 704 (Application for Consent to Transfer of Control) shall be submitted in order to transfer voluntarily or involuntarily (*de jure* or *de facto)* control of a corporation holding any licenses. FCC Form 704 shall also be used for non-substantial (*pro forma)* transfers of control. In addition, FCC Form 430 shall be submitted by the proposed transferee of a transmitting station unless the transferee has a current and substantially accurate report on file with the Commission.

(e) Whenever a group of station licenses in the same radio service for the same class of facility licensed to the same entity is to be assigned or transferred to a single assignee or transferee, a single application may be filed to cover the entire group, if the application identifies in an exhibit each station by call sign, station location and expiration date of license.

(f) Assignments and transfers of control shall be completed within 60 days from the date of authorization. The Commission shall be notified by letter of the date of consummation and the file numbers of the applications involved in the transaction.

§ 25.119 Application for special temporary authorizations.

(a) In circumstances requiring immediate or temporary use of facilities, request may be made for special temporary authority to install and/or operate new or modified equipment. The request must contain the full particulars of the proposed operation including all facts sufficient to justify the temporary authority sought and the public interest therein. No request for temporary authority will be considered unless it is received by the Commission at least 3 working days prior to the date of proposed construction or operation or, where an extension is sought, the expiration date of the existing temporary authorization. A request received within less than 3 working days

may be accepted only upon due showing of extraordinary reasons for the delay in submitting the request which could not have been earlier foreseen by the applicant. A copy of the request for special temporary authority also shall be forwarded to the Commission's Laurel, Maryland Field Office.

(b) The Commission may grant a temporary authorization for a period not to exceed 180 days, with additional periods not exceeding 180 days, upon a finding that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of these temporary operations would seriously prejudice the public interest. Convenience to the applicant, such as marketing considerations of meeting scheduled customer in-service dates, will not be deemed sufficient for this purpose.

§ 25.120 License term and renewals.

(a) License term. Licenses for facilities governed by this Part will be issued for a period of 10 years, except developmental licenses which will be issued for period of 1 year.

(b) The Commission reserves the right to grant or renew station licenses for less than 10 years if, in its judgment, the public interest, convenience and necessity will be served by such action.

(c) For earth stations, the license term will be specified in the instrument of authorization.

(d) For space stations, the license term will begin at 3 a.m. EST on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and that the operations of the satellite fully conform to the terms and conditions of the space station radio authorization.

(e) Renewal of License. Applications for renewals of earth station licenses must be submitted on FCC Form 405 (Application for Renewal of Radio Station License in Specified Services) no earlier than 90 days and no later than 30 days before the expiration date of the license.

EARTH STATIONS

§ 25.130 Filing requirements for transmitting earth stations.

(a) Applications for a new or modified transmitting earth station facility shall be submitted on FCC Form 493, accompanied by any required exhibits.

(b) A frequency coordination analysis in accordance with § 25.203 shall be provided for earth stations transmitting in frequency bands shared with equal rights between terrestrial and space services.

(c) In those cases where an applicant is filing a number of essentially similar applications, showings of a general nature applicable to all of the proposed stations may be submitted in the initial application and incorporated by reference in subsequent applications.

(d) Transmission of signals or programming to non-U.S. domestic satellites, or to foreign points by means of U.S. domestic satellites, may be subject to restrictions as a result of international agreements or treaties. The Commission will maintain public information on the status of any such agreements.

§ 25.131 Filing requirements for receive-only earth stations.

(a) Except as provided in paragraphs (b) and (j), applications for a license for a receive-only earth station shall be submitted on FCC Form 493, accompanied by any required exhibits.

(b) Except as provided in paragraph (j), receive-only earth stations in the domestic fixed-satellite service may be registered with the Commission in order to protect them from interference from terrestrial microwave stations in bands shared co-equally with the fixed service in accordance with the procedures of §§ 25.203 and 25.251-25.256.

(c) Licensing or registration of receive-only earth stations with the Commission confers no authority to receive and use signals or programming received from satellites. *See* Section 705 of the Communications Act. 47 U.S.C. § 605.

(d) Applications for registration shall be filed on FCC Form 493 accompanied by the coordination exhibit required by §25.203, and any other required exhibits. Any application which is deficient or incomplete in any respect shall be immediately returned to the applicant without processing.

(e) Complete applications for registration will be placed on public notice for 30 days and automatically granted if no objection is submitted to the Commission and served on the applicant. Additional pleadings are authorized in accordance with § 1.45 of this Chapter.

(f) The registration of a receive-only earth station results in the listing of an authorized frequency band at the location specified in the registration. Interference protection levels are those agreed to during coordination.

(g) Reception of signals or programming from non-U.S. domestic satellites may be subject to restrictions as a result of international agreements or treaties. The Commission will maintain public information on the status of any such agreements.

(h) Registration term: Registrations for receive-only earth stations governed by this section will be issued for a period of 10 years from the date on which the application was filed. Applications for renewals of registrations must be submitted on FCC Form 405 (Application for Renewal of Radio Station License in Specified Services) no earlier than 90 days and no later than 30 days before the expiration date of the registration.

(i) Applications for modification of license or registration of receive-only earth stations shall be made in conformance with § 25.117 of this subpart. Registrants are required to notify the Commission when a receive-only earth station is no longer operational or when it has not been used to provide any service during any 6 month period.

(J) Receive-only earth stations operating with:

(1) INTELSAT space stations;

(2) international space stations; or

(3) U.S. domestic and non-U.S. space stations for reception of services from other countries;

shall file an FCC Form 493 requesting a license for such station. Receive-only earth stations used to receive INTELNET I services from INTELSAT space stations need not file for licenses. *See* Deregulation

of Receive-Only Satellite Earth Stations Operating with the INTELSAT Global Communications Satellite System, Declaratory Ruling, RM No. 4845, FCC 86-214 (released May 19, 1986) .

§ 25.132 [Reserved]

§ 25.133 Period of construction; certification of commencement of operation.

(a) Each license for an earth station governed by this Part shall specify as a condition therein the period in which construction of facilities must be completed and station operation commenced. Construction of the earth station must be completed and the station must be brought into regular operation within 12 months from the date of the construction permit and/or license grant except as may be otherwise determined by the Commission for any particular application.

(b) Each license for a transmitting earth station included in this Part shall also specify as a condition therein that upon the completion of construction, each licensee must file with the Commission a certification including the following information: the name of the licensee, file number of the application, call sign of the antenna, date of the license, a certification that the facility as authorized has been completed, that each antenna facility has been tested and is within 2 dB of the pattern specified in § 25.209, and that the station is operational including the date of commencement of service, and will remain operational during the license period unless the license is submitted for cancellation. For stations authorized under § 25.115(c) of this subpart (Large Networks of Small Antennas operating in the 12/14 GHz bands), a certificate must be filed when the network is put into operation.

(c) If the facility does not meet the technical parameters set forth in § 25.209, a request for a waiver must be submitted and approved by the Commission before operations may commence.

(d) Each receiving earth station licensed or registered pursuant to § 25.131 must be constructed and placed into service within 6 months after coordination has been completed. Each licensee or registrant must file with the Commission a certification that the facility is completed and operating as provided in paragraph (b) with the exception of certification of antenna patterns.

SPACE STATIONS

§ 25.140 Qualifications of Domestic Fixed-Satellite Space Station licensees.

(a) New domestic fixed-satellites shall comply with the requirements established in Report and Order in CC Docket No. 81-704. The requirements for radio station applications for new domestic fixed-satellites are specified in Appendix B to the Commission's 1983 Processing Order (93 FCC 2d 1260 (1983)). Applications must also meet the requirements in paragraphs (b) through (e) of this section. The Commission may require additional or different information in the case of any individual application. Applications will be unacceptable for filing and will be returned to the applicant if they do not meet the requirements referred to in this paragraph.

(b) Each applicant for a space station authorization in the domestic fixed-satellite service must demonstrate, on the basis of the documentation contained in its application, that it is legally, financially, technically, and otherwise qualified to proceed expeditiously with the construction, launch and/or operation of each proposed space station facility immediately upon grant of the requested authorization. Each applicant must provide the following information:

(1) The information specified in § 25.114.

(2) Financial qualifications should be demonstrated in the form specified below. Failure to make such a showing shall result in the dismissal of the application.

(3) An interference analysis to demonstrate the compatibility of its proposed system 2° from any authorized space station. Applicants should provide details of their proposed r.f. carriers which they believe should be taken into account in these analyses. At a minimum, the applicant must include, for each type of r.f. carrier, the link noise budget, modulation parameters, and overall link performance analysis. (*See, e.g.*, Appendices B and C to Licensing of Space Stations in the Domestic Fixed-Satellite Service, 48 FR 40233 (September 6, 1983)) .

(c) Each application for authority to construct and/or to launch and operate a space station in this service shall include a detailed statement of estimated investment and operating costs for the expected lifetime of the facility, and shall demonstrate in accordance with paragraph (d) of this section the applicant's current financial ability to meet the:

(1) Estimated costs of proposed construction and/or launch, and any other initial expenses for the space station(s); and

(2) Estimated operating expenses for one year after launch of the proposed space station(s).

(d) Each application for authority to construct and/or launch a space station shall demonstrate an applicant's current financial ability to meet the costs specified in paragraph (c) of this section by submitting the following financial information verified by affidavit:

(1) A balance sheet current for the latest fiscal year and documentation of any financial commitments reflected in the balance sheet (such as, for example, loan agreements and service contracts) together with an exhibit demonstrating that the applicant has current assets and operating income sufficient to satisfy the requirements of paragraph(c) of this section. If the applicant is owned by more than one corporate parent, it must submit evidence of a commitment to the proposed satellite program by management of the corporate parent upon whom it is relying for financial resources;

(2) If the submissions of paragraph (d) (1) of this section do not satisfy paragraph (c) of this section, the applicant shall submit additional information as listed below to satisfy paragraph (c) of this section.

(i) The terms of any fully negotiated loan or other form of credit arrangement intended to be used to finance the proposed construction, acquisition, or operation of the

requested facilities including such information as the identity of the creditor (or creditors), the amount committed, letters of commitment, detailed terms of the transaction, including the details of any contingencies, and a statement that paragraph (e) of this section is complied with;

(ii) The terms of any fully negotiated sale or placement of any equity or other form of ownership interest, including the sale, or long-term lease for the lifetime of the satellite, of proposed satellite transponder capacity in the level of detail as specified in paragraph (d) (2) (i) of this section;

(iii) Any financing arrangements contingent on further performance by either party, such as marketing of satellite capacity or raising additional financing, will not satisfy the requirements of paragraph (c) of this section.

(3) Whatever other information or details the Commission may require with regard to a specific application or applicant;

(e) Any loan or other credit arrangement providing for a chattel mortgage or secured interest in any proposed facility must include a provision for a minimum of ten (10) days prior written notification to the licensee or permittee, and to the Commission, before any such equipment may be repossessed under default provision of the agreement.

(f) An applicant found to be qualified pursuant to paragraph (b) of this section may be initially assigned up to two orbital locations in each pair of frequency bands proposed. Authorizations to construct ground spares are at the applicant's risk that launch authorization will not be granted by the Commission.

(g) Each applicant found to be qualified pursuant to paragraph (b) may be assigned no more than one additional orbital location beyond its current authorizations in each frequency band in which it is authorized to operate, provided that its in-orbit satellites are essentially filled and that it has no more than two unused orbital locations for previously authorized but unlaunched satellites in that band.

(h) In the event that one or more applications satisfying the requirements of this section are ready for grant, any orbital location occupied by a satellite that is determined to be a part of a system that is not essentially filled may be cancelled and colocation of in-orbit satellites may be required. The Commission may take this action if, in so doing, it would allow the grant of pending applications that satisfy the requirements of this section. If a cancellation is made, the licensee will be afforded a period of 30 days to notify the Commission which of its assigned locations should be cancelled.

§25.141 Licensing provisions for the Radiodetermination Satellite Service.

(a) Space station application requirements. Each application for a space station license in the radiodetermination satellite service shall describe in detail the proposed radiodetermination satellite system, setting forth all pertinent technical and operational aspects of the system, including its capability for providing and controlling radiodetermination service on a geographic basis, and the technical, legal and financial qualifications of the applicant. In particular, each application shall include the information specified in Appendix B of Space Station Application Filing Procedures, 93 FCC 2d 1260, 1265 (1983), except that in lieu of demonstrating compliance with item II. F (two degree spacing), applicants are required demonstrate compatibility with licensed radiodetermination satellite systems. Applicants must also file information demonstrating compliance with all requirements of this section, specifically including information demonstrating how the applicant has complied or plans to comply with the requirements of paragraph (f) .

(b) Space station application procedures. Each application for a space station in the radiodetermination satellite service shall be placed on public notice for 60 days, during which time interested parties may file comments and petitions related to the application. A 60 day cut-off period shall also be established for the filing of applications to be considered in conjunction with an original application.

(c) User transceivers. Individual user transceivers will not be licensed. Service vendors may file blanket applications for transceiver units using FCC Form 493 and specifying the number of units to be covered by the blanket license. FCC Form 430 should be submitted if not already on file in conjunction with other facilities licensed under this subpart. Each application must demonstrate that transceiver operations will not cause interference to other users of the spectrum.

(d) Permissible communications. Stations in this service are authorized to render radiodetermination service, and may not render other services except as ancillary to the radiodetermination service.

(e) Frequency allocation policies. Each radio determination satellite service licensee will be assigned the entire allocated frequency bands on a non-exclusive basis. Coding techniques and power limits as set forth in paragraph (f) below and orbital spacing shall be employed to avoid harmful interference with other radiodetermination satellite service systems.

(f) Radiodetermination satellite service. Licenses shall coordinate with other licensees to avoid harmful interference to other radiodetermination satellite systems through (1) power flux density limits; (2) use of pseudorandom-noise codes (for both the satellite-to-user link and for the user-to-satellite link); and random access, time division multiplex techniques.

(g) License conditions. All authorizations in the radiodetermination satellite service shall be subject to the policies set forth in the Report and Order, including compliance with Appendix D, and the Second Report and Order in General Docket Nos. 84-689 and 84-690 and to any policies and rules the Commission may adopt at the later date.

PROCESSING OF APPLICATIONS

§ 25.150 Receipt of applications.

Applications received by the Commission are given a file number and (domestic only) a unique station identifier for administrative convenience. Neither the assignment of a file number and/or other identifier nor the listing of the application on public notice as received for filing indicates that the application has been found accept-

able for filing or precludes the subsequent return or dismissal of the application if it is found to be defective or not in accordance with the Commission's rules.

§ 25.151 Public notice period.

(a) At regular intervals, the Commission will issue public notices listing:

(1) the receipt of applications for new station authorizations;

(2) the receipt of applications for license or registration of receive-only earth stations;

(3) the receipt of applications for major modifications to station authorizations;

(4) the receipt of major amendments to pending applications;

(5) the receipt of applications to assign or transfer control of space station facilities, transmitting earth station facilities, or international receive-only earth station facilities;

(6) significant Commission actions regarding applications;

(7) information which the Commission in its discretion believes to be of public significance; and

(8) special environmental considerations as required by Part 1 of this Chapter.

(b) Special public notices may also be issued at other times under special circumstances involving non-routine matters where speed is of the essence and efficiency of Commission process will be served thereby.

(c) A public notice will not normally be issued for receipt of any of the following applications:

(1) for authorization of a minor technical change in the facilities of an authorized station;

(2) for temporary authorization pursuant to § 25.119;

(3) for an authorization under any of the proviso clauses of Section 308(a) of the Communications Act of 1934, as amended [47 U.S.C. §308(a)];

(4) for consent to an involuntary assignment or transfer of control of a transmitting earth station authorization; or

(5) for consent to an assignment or transfer of control of a transmitting earth station authorization, where the assignment or transfer does not involve a substantial change in ownership or control; or

(6) for change in location of an earth station operating in the 4/6 GHz and 10. 95-11. 7 GHz bands by no more than 1" in latitude and/or longitude and for change in location of an earth station operating in the 12/14 GHz bands by no more than 10" in latitude and/or longitude.

(d) No application that has appeared on public notice will be granted until the expiration of a period of thirty days following the issuance of the public notice listing the application, or any major amendment thereto. Any comments or petitions must be delivered to the Commission by that date in accordance with § 25.154.

§ 25.152 Dismissal and return of applications.

(a) Any application may be dismissed without prejudice as a matter of right if the applicant requests its dismissal prior to final Commission action.

(b) The Commission will dismiss an application for failure to prosecute or for failure to respond substantially within a specified time period to official correspondence or requests for additional information. Dismissal will be without prejudice unless the application is mutually exclusive pursuant to § 25.155, in which case it will be dismissed with prejudice.

§ 25.153 Repetitious applications.

(a) Where an application has been denied or dismissed with prejudice, the Commission will not consider a like application involving service of the same kind to the same area by the same applicant, or by its successor or assignee, or on behalf of or for the benefit of any of the original parties in interest, until after the lapse of 12 months from the effective date of the Commission's action. The Commission may, for good cause shown, waive the requirements of this section.

(b) Where an appeal has been taken from the action of the Commission denying a particular application, another application for the same class of station and for the same area, in whole or in part, filed by the same applicant or by his successor or assignee, or on behalf or for the benefit of the original parties in interest, will not be considered until the final disposition of the appeal.

§ 25.154 Opposition to applications and other pleadings.

(a) Petitions to deny, petitions for other forms of relief, and other objections or comments must:

(1) Identify the application or applications (including applicant's name, station location, Commission file numbers, and the radio service involved) with which it is concerned;

(2) be filed within thirty (30) days after the date of public notice announcing the acceptance for filing of the application or major amendment thereto (unless the Commission otherwise extends the filing deadline);

(3) filed in accordance with the pleading limitations, periods and other applicable provisions of §§ 1.41 through 1.52 of this Chapter;

(4) contain specific allegations of fact (except for those of which official notice may be taken) to support the specific relief requested, which shall be supported by affidavit of a person or persons with personal knowledge thereof, and which shall be sufficient to demonstrate that the petitioner (or respondent) is a party of interest and that a grant of, or other Commission action regarding, the application would be prima facie inconsistent with the public interest; and

(5) contain a certificate of service showing that it has been mailed to the applicant no later than the date the pleading is filed with the Commission.

(b) The Commission will classify as informal objections:

(1) Any pleading not filed in accordance with paragraph (a) of this section;

(2) any pleading to which the thirty (30) day public notice period of § 25.151 does not apply; or

(3) any objections to the grant of an application when the objections do not conform to either paragraph (a) of this section or to other Commission rules and requirements.

(c) Oppositions to petitions to deny an application or responses to comments and informal objections regarding an application may be filed within 10 days after the petition, comment, or objection is filed and must be in accordance with other applicable provisions of §§ 1.41 through 1.52 of this Chapter.

(d) Reply comments by the party that filed the original petition may be filed with respect to pleadings filed pursuant to paragraph (c) within 5 days after the time for filing oppositions has expired unless the Commission otherwise extends the filing deadline and must be in accordance with other applicable provisions of §§ 1.41 through 1.52 of this Chapter.

§ 25.155 Mutually exclusive applications.

(a) The Commission will consider applications to be mutually exclusive if their conflicts are such that the grant of one application would effectively preclude by reason of harmful electrical interference, or other practical reason, the grant of one or more other applications.

(b) An application will be entitled to comparative consideration with one or more conflicting applications only if:

(1) The application is mutually exclusive with another application; and

(2) the application is received by the Commission in a condition acceptable for filing

(i) by the "cut-off" date specified in a public notice; or

(ii) if no "cut-off" date is specified, within 30 days after the date of the public notice listing the first of the conflicting applications as acceptable for filing.

§ 25.156 Consideration of applications.

(a) Applications for a radio station authorization, or for modification or renewal of an authorization, will be granted if, upon examination of the application, any pleadings or objections filed, and upon consideration of such other matters as it may officially notice, the Commission finds that the applicant is legally, technically, and otherwise qualified, that the proposed facilities and operations comply with all applicable rules, regulations, and policies, and that grant of the application will serve the public interest, convenience and necessity.

(b) Whenever the Commission grants any application in part, or subject to any terms or conditions other than those routinely applied to applications of the same type, the grant shall be considered final unless the Commission should revise its action (either by granting the application as originally requested, or by designating the application for hearing) in response to a petition for reconsideration which:

(1) is filed by the applicant within thirty (30) days from the release date of the conditioned grant; and

(2) rejects the grant as made and explains the reasons why the application should be granted as originally requested.

(c) Reconsideration or review of any final action taken by the Commission will be in accordance with Subpart A of Part 1 of this Chapter.

FORFEITURE, TERMINATION, AND REINSTATEMENT OF STATION AUTHORIZATION

§ 25.160 Administrative sanctions.

(a) A forfeiture may be imposed for failure to operate in conformance with the Communications Act, license specifications, any conditions imposed on an authorization, or any of the Commission's rules and regulations; or for failure to comply with Commission requests for information needed to complete international coordination or for failure to cooperate in Commission investigations with respect to international coordination.

(b) A forfeiture will be imposed and the station license may be terminated for the malicious transmissions of any signal that causes harmful interference with any other radio communications or signals.

(c) A station license may be revoked for any repeated and willful violation of the kind set forth in paragraphs (a) and (b).

(d) The sanctions specified in paragraphs (a), (b) and (c) will be imposed only after the licensee has been provided an opportunity to be heard pursuant to Titles III and V of the Communications Act of 1934, as amended.

(e) For purposes of this section, the terms "repeated" and "willful" are defined as set out in Section 312 (f) of the Communications Act, 47 U. S. C. § 312(f).

§ 25.161 Automatic termination of station authorization.

A station authorization shall be automatically terminated in whole or in part without further notice to the licensee upon:

(a) the expiration of the required date of completion of construction or other required action specified in the authorization, or after any additional time authorized by the Commission, if a certification of completion of the required action has not been filed with the Commission unless a request for an extension of time has been filed with the Commission but has not been acted on;

(b) the expiration of the license period, unless an application for renewal of the license has been filed with the Commission pursuant to §25. 120(e); or

(c) the removal or modification of the facilities which renders the station not operational for more than 90 days, unless specific authority is requested.

§ 25.162 Cause for termination of interference protection.

The protection from interference afforded by the registration of a receiving earth station shall be automatically terminated if:

(a) the request for registration is not submitted to the Commission within 3 months of the completion of the frequency coordination process, except at provided for in § 25.203;

(b) the receiving earth station is not constructed and placed into service within 6 months after completion of coordination;

(c) the Commission finds that the station has been used less than 50% of the time during any 12 month period;

(d) the Commission finds that the station has been used for an unlawful purpose or otherwise in violation of the Commission's rules, regulations or policies;

(e) the Commission finds that the actual use of the facility is inconsistent with what was set forth in the registrant's application; or

(f) the Commission finds that the frequency coordination exhibit, upon which the granted registration is based, is incomplete or does not conform with established coordination procedures.

§ 25.163 Reinstatement.

(a) A station authorization terminated in whole or in part under the provisions of § 25.161 may be reinstated if the Commission, in its discretion, determines that reinstatement would best serve the public interest, convenience and necessity. Petitions for reinstatement will be considered only if:

(1) the petition is filed within 30 days after the expiration date set forth in § 25.161(a) or § 25.161(b) , whichever is applicable;

(2) the petition explains the failure to file a timely notification or renewal application; and

(3) the petition sets forth with specificity the procedures which have been established to insure timely filings in the future.

(b) A special temporary authorization shall automatically terminate upon the expiration date specified therein, or upon failure of the grantee to comply with any special terms or conditions set forth in the authorization. Temporary operation may be extended beyond the termination date only upon application to the Commission.

8. Section 25.202(c) is removed and Sections 25.202(d) through (g) are redesignated as Sections 25.202(c) through (f), respectively.

9. The heading of Subpart E is revised to read as follows:

Subpart E - Developmental Operations

10. Section 25.390 is redesignated as Section 25.300 and paragraphs (c) and (g) are removed and paragraphs (d) through (o) are redesignated as (c) through (m) respectively.

11. Newly redesignated Section 25.300(c) is revised to read as follows:

(c) Forms to be used: A separate application for construction permit shall be submitted on FCC Form 493 for each earth station. No form is used for space stations. See § 25.114 for information to be supplied in space station applications.

12. In addition to the amendments set forth above, in newly redesignated Section 25.300 remove the words "Communication-Satellite Service" and add, in their place, the words "space radiocommunication service" in the following places: newly redesignated Section 25.300(a), (b), (d), and (f).

13. Section 25.308 of Subpart C is redesignated as Section 25.308 of Subpart E.

14. Sections 25.391 and 25.392 are removed.

FCC 493
March 1991

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

Approved by OMB
3060-0000
Expires 00/00/00

INSTRUCTIONS FOR COMPLETION OF FCC FORM 493
APPLICATION FOR EARTH STATION AUTHORIZATION OR FOR MODIFICATION OF STATION LICENSE

General Information and Instructions

A. FCC Form 493 is to be used to apply for a license to construct and/or operate a transmit/receive earth station, a transmit-only earth station; to register a domestic receive-only earth station; to license an international receive-only earth station; or to modify a granted license or registration. These licensing activities are restricted to the following satellite services:

Domestic Fixed-Satellite Service
International Fixed-Satellite Service
Radiodetermination-Satellite Service
Mobile-Satellite Serivce

Applicable Rules and Regulations

B. Before this application is prepared, the applicant should refer to Part 25 of the Rules and Regulations of the Commission, (Title 47, Code of Federal Regulations (CFR), Part 25) copies of which may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402. Part 25 may require information to be filed with an application in addition to that specified in the application form. Applicant should make every effort to file a complete application in compliance with the Rules. Failure to do so can result in rejection or return of the application or a delay in the processing of the application. Use additional sheets only where necessary. All additional sheets must contain the applicant's name and the number of question to which it responds.

Number of Copies

C. All entries on the form shall be typed or legibly printed in ink. An original and two copies of the application must be submitted. Applicants filing for a 12/14 GHz VSAT Network should submit an original and five copies of each application.

Fees

D. A processing fee is required with this application. Please refer to either 47 CFR 1.1105, the Common Carrier Fee Filing Guide, or call (202) 632- **FEES** for appropriate fee. **DO NOT SEND CASH.** Payment may be made by check, bank draft, or single money order payable to: **Federal Communications Commission.**

Submission of Applications

(E) Each application should be assembled with an Fee Processing Data Sheet (FCC 155 Form) stapled to the top of the application. Place the check on top of the Fee Processing Data Sheet. **Please do not staple the check to the application.** Required copies of applications should be clearly identified as "duplicate copy" and placed behind the original package. A copy of an application submitted for receipt purposes only should be placed at the bottom of the submission. Extraneous material and extra copies should be avoided at all times. Failure to abide by these instructions will delay the processing of your submission.

Addresses for Mail-In Applications

(FX1) Applications for Domestic Earth Stations are to be mailed to:

Federal Communications Commission
Common Carrier Domestic Earth Stations
P.O. Box 358160
Pittsburgh, PA 15251-5160

(2) Applications for International Earth Stations are to be mailed to:

Federal Communications Commission
Common Carrier International
P.O. Box 358115
Pittsburgh, PA 15251-5115

Receive-Only Earth Station Registration

G. Receive-only earth stations may be registered with the Commission in order to protect them from interference from terrestrial microwave stations in the 4 GHz shared band pursuant to 47 CFR Sections 25.131 and 25.133. Registration results in the listing of an earth station at a specified location with interference levels agreed to during coordination. We will not accept applications for registration of receive-only earth stations in the 12 GHz band because downlinks in the fixed-satellite service are given primary allocation status in that band. Pursuant to 47 CFR Section 25.133(d), each registrant for a receive-only earth station must file a certificate that its facility is constructed and operating. Receive-only earth stations operating with INTELSAT space stations, international space stations or U.S. domestic and non-U.S. space stations for reception of services from other countries are required to be licensed except that earth stations used to receive INTELNET I services from INTELSAT space stations need not file for licenses.

Transmit/Receive Earth Station Applications

H. Pursuant to 47 CFR Section 25.113, construction permits are no longer required for certain transmit/receive earth stations. These include domestic satellite earth stations, international satellite earth stations operating with INTELSAT and INMARSAT and earth stations operating with international space

stations licensed pursuant to Establishing of Satellite Systems Providing International Communications, 50 FR 42266 (October 18, 1985), 101 FCC 2d 1201 (1985). A construction permit is required for all other earth station facilities. Construction of stations prior to the grant of a license is at the applicant's own risk. Pursuant to 47 CFR Section 25.133(b), each licensee for a transmitting station shall file a certification that its facility is constructed and in operation.

Notice to Individuals Required by the Privacy Act of 1974 and the Paperwork Reduction Act of 1980: 1. The information requested by this form will be used by Federal Communications Commission staff to determine eligibility for issuing authorizations in the use of frequency spectrum and to effect the provisions of regulatory responsibilities rendered the Commission by the Communications Act of 1934, as amended. Response to the information requested is required to obtain the requested authorization. Information requested by FCC 493 will be available to the public.

Public reporting burden for this collection of information is estimated to average 24 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Federal Communications Commission, Office of Managing Director, Washington, D.C. 20554, and to Office of Management and Budget, Paperwork Reduction Project (3060-0000), Washington, D.C. 20503.

FCC 493
March 1991

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Approved By OMB
3060-0000
Expires 00/00/00

APPLICATION FOR EARTH STATION AUTHORIZATION OR FOR MODIFICATION OF STATION LICENSE

Read Instructions Before Completing and For Information Regarding Public Burden Estimate

FCC USE ONLY
File Number

Call Sign

1. Name of Applicant (must be same as reported on FCC 430 Form, Licensee Qualification Report)

Mailing Street Address or P.O. Box, City, State and ZIP Code | (Area Code) Telephone Number

2. Contact Representative. Provide the following if the person to contact is other than applicant.

Name

Mailing Street Address or P.O. Box, City, State and ZIP Code | (Area Code) Telephone Number

3. Class of Station

a ☐ Fixed Earth Station
b ☐ Temporary Fixed Earth Station
c ☐ 12/14 GHz VSAT Network
d ☐ Mobile Earth Station
e ☐ Other (Specify):

4. Nature of Service

a ☐ Domestic Fixed-Satellite
b ☐ International Fixed-Satellite
c ☐ Radiodetermination-Satellite
d ☐ Mobile-Satellite
e ☐ Other (Specify):

5. Is developmental operation requested?
☐ YES ☐ NO

6(a) Type of Request

1 ☐ License for transmit/receive earth station
2 ☐ License for transmit-only earth station
3 ☐ Registration or License for receive-only earth station
4 ☐ Modification of License/Registration (Complete items 7(a)-(c))

6(b) Number of Stations: ▶

7(a) Purpose of Proposed Modification

1 ☐ Change in emissions
2 ☐ Change in antenna
3 ☐ Change in location
4 ☐ Change in assigned frequencies
5 ☐ Change in points of communications
6 ☐ Change in range of satellite arc
7 ☐ Other (Specify):

(b) Call Sign of Station

(c) File No. of Current Authorization

8. Location (Number, Street, City, County, State and ZIP Code) and Telephone Number of Earth Station Site. (If temporary fixed or VSAT Network license, specify area of operation and point of contact - name and telephone number)

9. Latitude and Longitude
Deg. - Min. - Sec.
Lat. North
Long. West

10. Site Elevation (AMSL)
feet meters

11. Points of Communications (For satellites operating within the frequency bands and geostationary arc coordinated for these facilities, in most cases, the entry "ALSAT" is sufficient for Domestic Fixed-Satellite Services; for all other services each satellite must be listed).

12. Frequency Coordination Limits

(a) Frequency Limits	(b) Range of Satellite Arc		(c) Antenna Elevation Angle		(d) Earth Station Azimuth		(e) Maximum EIRP Density Toward the Horizon (dBW/4kHz)
	(i) Eastern Limit	(ii) Western Limit	(i) Eastern Limit	(ii) Western Limit	(i) Eastern Limit	(ii) Western Limit	

13. Transmitting Equipment

(a) No. of HPA's	(b) Manufacturer	(c) Model No.	(d) Maximum Power Output (watts)

14. Antenna Facilities (Corresponding line number in item 14 and 15 applies to same antenna)

Line No.	(a) Quantity	(b) TT&C*	(c) Manufacturer	(d) Model	(e) Size (meters)	(f) Type of Feed	(g) Gain Transmit and/or Receive (_____dBi at _____ GHz)
1							
2							
3							
4							

15. Antenna Heights - Measurements to be given in English and metric units)

Line No.	(h) Maximum Antenna Height Above Ground Level		(h) Maximum Antenna Height Above Mean Sea Level		(i) Building Height** Above Ground Level		(j) Maximum Antenna Height** Above Rooftop	
1	feet	meters	feet	meters	feet	meters	feet	meters
2	feet	meters	feet	meters	feet	meters	feet	meters
3	feet	meters	feet	meters	feet	meters	feet	meters
4	feet	meters	feet	meters	feet	meters	feet	meters

16. Particulars of Operation (Full particulars are required for each r.f. carrier)

(a) Frequency Bands (MHz)	(b) Antenna Polarization (H,V,L,R)	(c) Emission Designator	(d) Maximum EIRP (dBW)	(e) Maximum EIRP Density (dBW/4kHz)	(f) Description of Modulation

17. Receiving System Noise Temperature: (in kelvin with applicable antenna elevation angle and frequency)

*Check only for antennas used for satellite Telemetry, Tracking and Control (TT&C).

**Attach sketch of site or exemption. See 47 CFR Part 17.

Place an "X" in the appropriate column.	YES	NO
18. Does the proposed antenna(s) comply with the antenna gain patterns specified in Section 25.209(a) and (b) as demonstrated by the manufacturer's qualification measurements? ▶ Attach manufacturer's verification that the antenna complies with these patterns if not on file.		
19. Is the facility to be operated by remote control? ▶ If "YES," provide the location (street, city, county, state, zip code) and telephone number of the control point.		
20. Small Antenna Impact (a) Will an antenna less than 9 meters in diameter be used at this site to transmit to a fixed-satellite below 7075 MHz? ▶		
(b) Will an antenna less than 5 meters in diameter be used at this site to transmit to a fixed-satellite from 7075 MHz to 14.5 GHz? ▶		
(c) If the answer to (a) or (b) above is "YES", answer all of the following questions that apply to the proposed earth station facilities. (i) Transmissions in the band 5925-7075 MHz will be limited to a maximum bandwidth of _____ MHz and maximum EIRP density of _____ dBW/4kHz. (ii) Transmissions in the band 7075 MHz to 14.5 GHz will be limited to a maximum bandwidth of _____ MHz and maximum EIRP density of _____ dBW/4kHz. (iii) Will operation of this facility be governed by a previous small antenna authorization? ▶ If "YES", provide cite: _____ If "NO", attach small antenna analysis.		
21. Is the facility to be used to provide Radiodetermination-Satellite Service (RDSS) in the frequencies allocated for RDSS? ▶ If "YES", attach exhibit demonstrating that operations are compatible with other operations.		
22. Is the facility to be used to provide Mobile-Satellite Service (MSS) in the frequencies allocated for MSS? ▶ If "YES", attach exhibit demonstrating that facility is consistent with operations in these frequencies.		
23. Frequency Coordination (a) Is frequency coordination required? ▶ If "YES", attach a frequency coordination report.		
(b) Is coordination with another country required? ▶ If "YES", attach name of country and plot of coordination contours.		
24. FAA Notification - (See 47 CFR Part 17) Is FAA notification required for any of the new or modified structures proposed in this application? ▶ If "YES", attach a copy of FCC 854 form and/or the FAA's study regarding the potential hazard to aviation of the structure.		
25. Environmental Impact Would a commission grant of this application be an action which may have a significant environmental effect as defined by Section 1.1307 of the Commission's Rules? ▶ If "YES", submit the statement as required by Sections 1.1308 and 1.1311.		

26. Description. (Summarize the nature of the application and the services to be provided).

Place an "X" in the appropriate column.	YES	NO
27. Rule Waivers and Exceptions Is this application inconsistent with any of the Commission's Rules? ▶ If "YES", attach a copy of requests for waivers or exceptions with supporting documents.		
28. Eligibility (a) Is the applicant a foreign government or a representative thereof? ▶		
(b) Does the applicant meet the requirements of Section 310(bX1), (2) and (3) of the Communications Act (47 USC 310(bX1), (2) and (3))? ▶		
(c) Does the applicant meet the requirements of Section 310(bX4) of the Communications Act (47 USC 310(bX4))? If "NO", attach an exhibit explaining why grant is in the public interest. ▶		
29. Will the station be used to provide common carrier services? ▶		
30. Will the station be used for developmental purposes? If "YES", attach an exhibit detailing the developmental plan. ▶		
31. If transmitting antenna, will individual applicant, partner (in case of partnership) or full-time manager (in case of corporation) actively participate in the day-to-day management and operation of proposed facility? ▶ If "NO", submit an exhibit providing an explanation, and including a demonstration of how control over the facility will be retained.		
32. For transmitting antennas that provide domestic or international service, attach FCC 430 form, or if a complete and accurate FCC 430 form is already on file with the FCC give date filed: Is FCC 430 form attached? ▶		

33. Exhibits. Identify the exhibits that are attached to this application.

Exhibit No.	
1	
2	
3	
4	
5	

34. **Certification of Person Responsible for Preparing Engineering Information in this Application.** I hereby certify that I am the technically qualified person responsible for preparation of the engineering information contained in this application, that I am familiar with Part 25 of the Commission's Rules, that I have either prepared or reviewed the engineering information submitted in this application, and that it is complete and accurate to the best of my knowledge.

Date	Typed Name of Person Signing	Signature

35. Certification of Applicant. The applicant waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests a construction permit, if necessary, in accordance with this application. All statements made in the attached exhibits are a material part hereof and are incorporated herein as if set out in full in this application. The undersigned, individually and for the applicant, hereby certifies that the statements made in this application are true, complete and correct to the best of the signer's knowledge and belief, and are made in good faith.

Date	Typed Name of Person Signing	Signature

WILLFUL FALSE STATEMENTS MADE ON THIS APPLICATION ARE PUNISHABLE BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 1001), and/or **REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT** (U.S. Code, Title 47, Section 312(aX1)), and/or **FORFEITURE** U.S. Code, Title 47, Section 503).

Notice to Individuals Required by the Privacy Act of 1974 and the Paperwork Reduction Act of 1980
The information requested by this form will be used by Federal Communications Commission staff to determine eligibility for issuing authorizations in the use of frequency spectrum and to effect the provisions of regulatory responsibilities rendered the Commission by the Communications Act of 1934, as amended. Response to the information requested is required to obtain the requested authorization. Information requested by this form will be available to the public. Public reporting burden for this collection of information is estimated to average 24 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Federal Communications Commission, Office of Managing Director, Washington, D.C. 20554, and to Office of Management and Budget, Paperwork Reduction Project (3060-0000), Washington, D.C. 20503.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-85

In re Applications of

BARBARA KEY PEEL (hereafter "Peel")	File No. BPH-890906MI
SAGE BROADCASTING CORPORATION OF JUPITER, FLORIDA (hereafter "Sage")	File No. BPH-890912MF
SUN OVER JUPITER BROADCASTING, INC. (hereafter "Sun")	File No. BPH-890913MG
JUPITER INLET MARINERS RADIO SERVICE, INC. (hereafter "Inlet")	File No. BPH-890913MH
TRIPLE J PROPERTIES, INC. (hereafter "Triple J")	File No. BPH-890913MI
TYLER COMMUNICATIONS, LIMITED PARTNERSHIP (hereafter "Tyler")	File No. BPH-890913MK
DIANE M. BOSLER (hereafter "Bosler")	File No. BPH-890913ML
(John E. Morris and Lawrence R. Baker d/b/a) MORBAK COMMUNICATIONS (hereafter "Morbak")	File No. BPH-890913MN
(Richard Rieke and Audrey Rieke d/b/a) RIEKE GENERAL PARTNERSHIP (hereafter "Rieke")	File No. BPH-890914MB
GREAT RED SPOT, INC. (hereafter "Great Red")	File No. BPH-890914MC
STONE MOUNTAIN BROADCASTING COMPANY (hereafter "Stone")	File No. BPH-890914MD
JUPITER RADIO, INC. (hereafter "JRI")	File No. BPH-890914ME
INTERMART BROADCASTING OF PALM BEACH, INC. (hereafter "Intermart")	File No. BPH-890914MG
OWENS BROADCASTING, LTD. (hereafter "Owens")	File No. BPH-890914MI
SOUTHERN MEDIA, INC. (hereafter "Southern")	File No. BPH-890914MJ
(Terry D. Moore d/b/a) PELICAN BROADCASTING (hereafter "Pelican")	File No. BPH-890914MK
MARY R. MEADOWS (hereafter "Meadows")	File No. BPH-890914MN
NEPHELE WING DOMENCICH (hereafter "Domencich")	File No. BPH-890914MO
BEATRICE SNYDER (hereafter "Snyder")	File No. BPH-890914MQ
AFRO-AMERICAN BROADCASTERS LIMITED (hereafter "Limited")	File No. BPH-890914MS
MARILYN BIRK (hereafter "Birk")	File No. BPH-890914MV
(James B. Orthwein and George Y. Wheeler, III d/b/a) PAL-MAR RADIO PARTNERS (hereafter "Pal-Mar")	File No. BPH-890914MW
ARAGON ONE, INC. (hereafter "Aragon")	File No. BPH-890914MX
PALM BEACH BROADCASTING, INC. (hereafter "Palm Beach")	File No. BPH-890914MY

LIGHTHOUSE BROADCASTING, INC. (hereafter "Lighthouse")	File No. BPH-890914MZ
MOSTELLA BROADCASTING CORP., INC. (hereafter "Mostella")	File No. BPH-890914NC
(Fred Adams and Margaret Ann Wells et al. d/b/a) JUPITER RADIO PARTNERS (hereafter "Jupiter")	File No. BPH-890914NI
JUPITER BROADCASTING LIMITED PARTNERSHIP (hereafter "Broadcasting")	File No. BPH-890914NK
JUPITER COMMUNICATIONS CO. (hereafter "Communications")	File No. BPH-890914NM
JUPITER MEDIA PARTNERS, LTD. (hereafter "JMP")	File No. BPH-890914NN
JUPITER FM BROADCASTERS LIMITED PARTNERSHIP (hereafter "JFBLP")	File No. BPH-890914NO
GOLD COAST COMMUNICATIONS, INC. (hereafter "Gold Coast")	File No. BPH-890914NQ
PHYLLIS B. GILES (hereafter "Giles")	File No. BPH-890914NS
KB RADIO (hereafter "KB")	File No. BPH-890914NU
MANUEL PALAU (hereafter "Palau")	File No. BPH-890914NX
LAURA MARIA MCCOMAS DE LOS REYES (hereafter "Reyes")	File No. BPH-890914NZ
RICHARD M. CARRUS (hereafter "Carrus")	File No. BPH-890914OB
JUPITER RADIO BROADCASTING, INC. (hereafter "JRBI")	File No. BPH-890914OE
TREASURE COAST MEDIA, INC. (hereafter "Treasure")	File No. BPH-890914ML (DISMISSED HEREIN)

For Construction Permit for a New FM Station on Channel 288A (105.5 MHz) in Jupiter, Florida

HEARING DESIGNATION ORDER

Adopted: March 26, 1991; Released: May 21, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matter.* Treasure is a corporation owned by Sally Smalley DiLucente (50%) and by Tallahassee Broadcasting Co., Inc. (50%). In Section II, Item 6 of its application, Treasure states that all of Tallahassee's stock is voted by its majority shareholder, Mr. B. F. J. Timm. In Exhibit 1 of its application, the following FM broadcast interests are attributed to Mr. Timm: [1]

WGLF (FM)	Tallahassee, Florida	51% shareholder
WDMG-FM	Douglas, Georgia	100% shareholder
WSGL (FM)	Naples, Florida	51% shareholder
WPPR (FM)	Warner Robins, Georgia	100% shareholder
WCXL (FM)	Vero Beach, Florida	25.5% shareholder
WOZN (FM)	Key West, Florida	80% shareholder
WAPY (FM)	Apalachicola, Florida	100% owner
WMMO (FM)	Orlando, Florida	30.74% general partner
WAYP (FM)	Holmes Beach, Florida	14.2% general partner
WMMY (FM)	Solana, Florida	50% interest
BPH-880505OE	Oxnard, California	Individual Applicant
BPH-870506MG	Ponte Vedra Beach, Fl.	51% owner

3. As a result of his ownership of 51% of Tallahassee Broadcasting's 50% interest in Treasure's application, the instant application represents his 13th FM interest. Section 73.3555(d) prohibits the grant of any license for a commercial FM station if that grant would "result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in" more than 12 stations in the same service which are not

[1] As indicated in Treasure's February 4, 1991 amendment, Mr. Timm is also the applicant (File No. BPH-901123MD) for a construction permit to serve Amarillo, Texas on Channel 265C1 (100.9 MHz).

minority-controlled. There is no evidence in Treasure's application that any of the above licensees are minority-controlled. Therefore, we must conclude that the filing of Treasure's application violates the Commission's multiple ownership and inconsistent application rules. See 47 C.F.R. §§ 73.3555(d)(1)(ii) and 73.3518.

4. The Commission's clear intent in adopting its "hard look" processing procedures in MM Docket 84-750, 50 Fed. Reg. 19936, 19940 (1985) was to limit the filing of applications to those which could be granted under our multiple ownership rules. Applications filed in excess of this number are considered inconsistent within the meaning of § 73.3518 and are returned as unacceptable for filing. Since Treasure's application clearly lists 12 cognizable interests in other FM facilities and applications, Timm's interest in the instant application clearly violates our processing and multiple ownership rules. Therefore, Treasure's application must be dismissed as inadvertently accepted for filing.

5. *Tyler.* Tyler is a limited partnership, comprised of one general partner (Arthur S. Goodman) and two limited partners (Lura S. Madarang and The RadioActive Group, Inc.). Exhibit E-1 of Tyler's application identifies Bruce M. Lyons as RadioActive's president and 51% shareholder. This becomes relevant since Section II, Item 7(e) of FCC Form 301 (June 1989) requires applicants to indicate if the applicant or any party to it has or has had an interest in "a broadcast application in any pending or concluded Commission proceeding which left unresolved character issues against the applicant. " If answered in the affirmative, the applicant is to provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. Tyler responded to Item 7(e) in the negative. However, Commission records indicate that Mr. Lyons is the subject of a real party-in-interest issue specified in *Radio South Burlington, Inc.*, FCC 90M-1987 (released July 10, 1990); *Erratum*, Mimeo 5174 (released July 11, 1990). That issue was never resolved, because the subject application (of Maxine W. Snow) was dismissed pursuant to a pre-trial settlement agreement. *Radio South Burlington, Inc.*, FCC 90M-2652 (released August 24, 1990). Therefore, the following issue was designated for hearing against an application filed by Lyons in the subsequent Walpole, New Hampshire proceeding:

> To determine whether Bruce Lyons was an undisclosed party-in-interest in Maxine Snow's Lebanon, New Hampshire FM application (BPH-880126NX). To determine, from the evidence so adduced, whether Lyons possesses the basic qualifications to be a [Commission] licensee.

Gary P. Savoie, 5 FCC Rcd 5737 (1990). However, Lyons' application was subsequently dismissed without resolution of this issue. *Gary P. Savoie*, FCC 90M-3836 (released December 5, 1990). Finally, a similar issue was specified against Lyons' application in the Brandon, Vermont proceeding. *The Mirkwood Group*, 6 FCC Rcd 511 (1991). Because the issue involves Lyons' (and, derivatively, Tyler's) basic character qualifications and there is no assurance that it will necessarily be resolved in the Brandon proceeding, we will specify a similar issue on a contingent basis. Further, Tyler has failed to timely amend its application pursuant to 47 C.F.R. § 1.65 to notify the Commission of the specification of character issues against Lyons in those other proceedings, or the termination of those proceedings without resolution of these issues. Therefore, an appropriate reporting/lack of candor issue will also be specified herein.

6. RadioActive is also listed as the source of the necessary funds for construction and initial operation of Tyler's proposed facilities. However, our research indicates that RadioActive and/or Mr. Lyons may not be able to meet this commitment. Although Exhibit E-1 notes Mr. Lyons' varied broadcast interests, Tyler has failed to amend its application to reflect that involuntary assignments of RadioActive's or Lyons' licenses for WSCM (AM), WSHQ (FM) and WSHZ (FM) were granted to Barry W. Sims, Receiver on September 10, 1990 (BAL-900824EB, BAPLH-900824GL and BALH-900824GM, respectively). This fact clearly raises the possibility that RadioActive may not be in a position to provide the funds Tyler certifies as being available from this committed source. The appropriate financial issue will therefore be specified.

7. *Limited.* On October 10, 1990, 9 months after the last date for filing minor amendments as of right in this proceeding, Limited amended its application to propose relocating its transmitting antenna site to a new tower located at coordinates 26 degrees-58 minutes-36 seconds N. Latitude, 80 degrees-11 minutes-57 seconds W. Longitude. [2] Limited claimed that this amendment satisfied the "good cause" provisions of 47 C.F.R. § 73.3522 since the Federal Aviation Administration had recently issued a Determination of Hazard to Air Navigation for its tendered site at coordinates 26 degrees-57 minutes-20 seconds N. Latitude, 80 degrees-09 minutes-27 seconds W. Longitude. While this rationale is sufficient to satisfy our "good cause" criteria, our analysis of Limited's amended site map indicates the plotted coordinates (26 degrees-58 minutes-*05.4* seconds N. Latitude, 80 degrees-11 minutes-58 seconds W. Longitude) differ from those listed in Section V-B of its application. It is therefore impossible to determine from the face of the application whether the proposal is in compliance with certain Commission rules, including our acceptability criteria.

8. The geographic coordinates, to the nearest second, of the proposed transmitter site are critical to processing the application. Thus, in the present case, these inconsistent data make it impossible to determine the veracity of the site availability certification, the environmental impact statement, or the information supplied for FAA approval. In other cases, absence of this data makes it impossible to determine the distance from the proposed site to other proposed or existing facilities and to the community of license. In the commercial FM service, spacing determines acceptability of an application where mutual exclusivity exists with respect to a given allocation (*see* 47 C.F.R. § 73.207), and determines when mutual exclusivity exists between applicants for, or permittees of, different allocations. The geographic location also determines whether protection must be afforded to monitoring facilities and to radio quiet zones (*see* 47 C.F.R. § 73.1030), marks the center of the "blanketing" area (*see* 47 C.F.R. §

[2] This amendment was supplemented on October 15, 1990 to furnish the required site availability certification.

73.318), and is fundamental to the analysis of a proposal's environmental and electromagnetic effects on other, nearby communications facilities. Consequently, Limited's "suicide" amendment must be returned and processing will continue on its original proposal. [3]

9. *Palm Beach.* Palm Beach certified that sufficient funds to construct and operate the proposed facilities for three months without revenue were committed from non-voting shareholder Kent Foster. However, as the applicant noted in its November 19, 1990 amendment, the Review Board recently concluded that CHM Broadcasting, in which Mr. Foster held a 55% limited partnership interest and was relied upon as a funding source, was financially unqualified. *Texas Communications Limited Partnership,* 5 FCC Rcd 5876, 5879 (1990). In particular, Foster's financial history was found to raise serious questions concerning the reliability of his financial representations. A substantial and material question of fact therefore exists as to Palm Beach's financial qualifications, and an issue will be specified.

10. *JFBLP.* Broadcast Data Corporation (Data) is the limited partner of JFBLP. Data is in turn a wholly-owned subsidiary of Graphic Scanning Corporation (Graphic). In an action relating to Graphic Scanning Corp., by Order released August 24, 1982, the Commission designated for hearing applications filed by A.S.D. Answer Service, Inc., B.W. Communications, Inc., Vineyard Communications, Inc., and P.A.L. Communications Systems, Inc. The stated purpose of the proceeding was to determine the relationship between Graphic and the applicants and, in particular, whether Graphic was a real party-in-interest in the applicants. In an Initial Decision released January 5, 1985, the presiding Administrative Law Judge concluded (a) that, because of the non-traditional nature of the transactions involved, Graphic shall be deemed the real party-in-interest in the A.S.D., Vineyard, P.A.L. and B.W. applications; and (b) that all parties had exhibited a lack of candor and on occasion, intentionally misrepresented material facts to the Commission.

11. Claiming the above conclusions were without merit, Graphic filed exceptions with the Commission on March 15, 1985. After a proxy fight resulted in new management, Graphic asked the Commission to approve a settlement between the concerned parties. By its *Memorandum, Opinion & Order,* released November 21, 1986, the Commission approved such an agreement vacating the conclusions reached in the Initial Decision. This action absolved the revised Graphic corporate entity from the Administrative Law Judge's adverse conclusions, but held that the findings would apply if former Graphic principals Yampol, Slodowitz and Finfer, who were active in management at the time of the alleged misconduct, were to regain control of Graphic. *A.S.D. Answer Service, Inc., et al.,* 1 FCC Rcd 753 (1986), at paragraph 6. A petition for reconsideration of this action has been filed.

12. We also note that an affiliate of Graphic Scanning Corporation has been named as a defendant in a lawsuit captioned *Utah Telecourier v. MCI Telecommunications Corporation, et al.,* (W.D. Utah, 1984) in which the trading of interests in cellular radio telephone partnerships in connection with the Salt Lake City, Utah market has been challenged under state and federal antitrust laws. *See e.g., Meridian Communication,* 2 FCC Rcd 3630 (1987). Finally, a complaint has been filed by the Securities and Exchange Commission in the United States District Court for the Southern District of New York alleging the filing with the SEC of certain false, misleading and untimely statements concerning investments made in Graphic Scanning Corp. by Amster & Co., Arnold Marvin Amster, Barry Stuart Lafer, and Joel R. Packer in 1987. Appropriate conditions will be specified below concerning these matters.

13. *Gold Coast.* Gold Coast proposes to locate its transmitting antenna on the existing tower utilized by WTRU (FM). In Section V-B, Item 7(b)(2) of its application, as amended December 26, 1989, Gold Coast lists its antenna radiation center above mean sea level as 96 meters. However, this height does not match the 98 meter height displayed in Gold Coast's tower sketch. Since the Commission may take official notice in its records of the tower's location and heights, this discrepancy does not affect the acceptability of Gold Coast's application. However, Gold Coast will be required to amend its application to correct this discrepancy.

OTHER MATTERS

14. *Environmental/RF.* The following applicants propose to locate their transmitting antennas on or adjacent to the tower currently utilized by WTRU (FM) and WEXI (AM):

Peel	Snyder	Gold Coast
Sage	Birk	Giles
Tyler	Pal-Mar	KB
Bosler	Aragon	Palau
Great Red	Palm Beach	Carrus
Owens	Jupiter	
Meadows	Broadcasting	
Domencich	JFBLP	

Our engineering study indicates that these proposals may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that these applicants may have failed to comply

[3] We believe that the return of Limited's amendment is consistent with the recent opinion by the Court of Appeals for the District of Columbia Circuit in *Alegria I, Inc. v. FCC,* 905 F. 2d 471 (D. C. Cir. 1990). In that case, the Court remanded to the Commission the grant of an AM construction permit to Heritage Communications because the agency had failed to articulate the rationale for its tolerance of a succession of "major" amendments which normally would have required dismissal of Heritage's application under 47 C. F. R. § 73.3571(j). The Court held that "nowhere in the order under review did the Commission explicitly invoke [the *Golden Shores Broadcasting, Inc.,* 2 FCC Rcd 4743, 4744 (1987)] policy, explain why the circumstances of this case justified its invocation or expansion, or spell out the public interest considerations that justified its tolerance of a succession of major amendments. "*Id.,* at 474. *Golden Shores,* wrote the Court, appears to be "based on the rationale that because the withdrawal of an inadvertently submitted major amendment would not result in the procedural disruptions the rule was designed to avoid, an applicant should be given the opportunity to repair its mistake and return to the *status quo ante.* "*Id.,* at 475. Here, we are expressly invoking the *Golden Shores* doctrine, noting that the return of Limited's amendment "neither results in processing delays nor abridges any cognizable rights of other applicants. " *Id.,* at 474. Finally, Limited's application is returned to the *status quo ante* with the return of its October 10, 1990 amendment.

with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since these proposals may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include the effects of WEXI (AM) and WTRU (FM). In this regard, if the site is presently fenced in compliance with the guidelines, the applicants are required to so state and give the distance from the base of the tower to the fence. Accordingly, each of the applicants listed above will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the presiding judge shall thereafter not consider the environmental effects of the proposal. See Section 1.1308(d) of the Commission's Rules.

15. *Short-Spacing to WQOL.* Each of the captioned applicants is short-spaced to the licensed co-channel facilities of FM Station WQOL (Vero Beach, Florida). WQOL is authorized, pursuant to the *Report and Order* in MM Docket 86-284, 3 FCC Rcd 1049 (1988), *review denied* 4 FCC Rcd 2184 (1989), *petition for review dismissed* (D.C. Cir. 1989 --Case 89-126, to upgrade its facilities to Channel 279C2 (103.7 MHz). The licensee received its construction permit for this upgrade on May 2, 1989, but has yet to commence program test authority pursuant to 47 C.F.R. § 73.1620. Accordingly, the eventual permittee in this proceeding may not commence its program test authority until WQOL commences its similar operations on Channel 279C2 and will not receive grant of its license until WQOL is licensed to operate on Channel 279C2.

16. *Air Hazard.* As noted above in paragraphs 7-8 hereinabove, the Federal Aviation Administration has determined that Limited's proposed site in its tendered application would constitute a hazard to air navigation. Further, attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and applicants Stone, Intermart and Southern have been unsuccessful. An issue with respect thereto will be included and the FAA made a party to the proceeding.

17. *Site Availability.* Section VII of FCC Form 301 requires applicants to certify that they have "reasonable assurance, in good faith, that the site or structure proposed in Section V of this form, as the location of the transmitting antenna, will be available to the applicant for the applicant's intended purpose. "This certification must be made "by contacting the owner or person possessing control of the site or structure. "The form requires applicants to list the name of the person, that person's phone number, and identify whether the person owns the site, is the agent for the owner, or how that person otherwise possesses control of the site or structure. Tyler, Birk, Pal-Mar and Palau propose to place their transmitting antenna on the existing WTRU-FM tower on North Delaware Boulevard in Jupiter. These applicants indicate that assurances of the availability of this site were provided by Arthur S. Goodman, a principal in Tyler and current General Sales Manager for WTRU-FM. Mr. Goodman's job description in Exhibit E-4 of Tyler's application reads in its entirety:

> Oversee four person sales department
> Create sales packages and client promotions
> Coordinate station promotional events
> Represent station at community events
> Act as liaison between local business and station
> Conceptualize and execute advertising campaigns
> Establish positive public relations.

18. There is no evidence in either Mr. Goodman's vocational duties or in those applications claiming Mr. Goodman as the source of their site availability certifications to suggest that he possesses any degree of control over access to the WTRU tower. Our doubts are further raised since the majority of applicants proposing to locate on this tower have based their reasonable assurance of site availability on contact with Robert B. Taylor, identified as the owner of the facility. Accordingly, a site availability issue must be specified against Tyler, Birk, Pal-Mar and Palau, as well as Gold Coast which submitted no site certification for the site it amended to on December 26, 1989.

19. Rieke proposes to place its transmitting antenna on a new tower adjacent to the Jupiter Inlet Waterway. In Section VII of its application, Rieke notes that its assurances of the availability of this site are based on contact with Charles E. Reid of Jupiter Broadcasting Corp., "the proposed lessee of the site. "However, Rieke fails to provide any evidence how a "proposed lessee" can possess control of the site involved. A site availability issue will also be specified in this instance.

20. *Divestiture.* As mentioned in paragraph 17 hereinabove, Arthur S. Goodman, Tyler's sole general partner, is General Sales Manager of Jupiter, Florida FM Station WTRU. Applicant Mary R. Meadows has indicated that she and her husband are employed "in a management capacity at WPBF-TV" in nearby Tequesta, Florida. Since these connections may result in a violation of the Commission's cross-interest policy, Goodman and Meadows have indicated their intent to terminate their respective relationships in the event of grant of either of their applications. *See, e.g., Martin Lake Broadcasting Company,*

21 FCC 2d 180, 181-182 (1970). [4] Accordingly, in the event of grant of either application, Arthur S. Goodman or Mary R. Meadows will be required to sever all connections with WTRU-FM and WPBF-TV, respectively, prior to the commencement of program test authority.

21. *Section II, Item 6.* Sectio.. II, Item 6 of FCC Form 301 requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Sage and Pal-Mar have not completed Item 6 correctly, failing to list a residential address for any of their principals. Accordingly, Sage and Pal-Mar must submit an amendment which gives all the information required by Section II, Item 6 to the presiding Administrative Law Judge after this Order is released.

22. *EEO.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Tyler Morbak, Birk, Aragon, Palm Beach and Broadcasting have filed such statements, each is deficient. Tyler has not listed any specific organizations it proposes to utilize to encourage the referral of qualified female and minority job applicants. Neither Birk nor Aragon has listed specific recruitment sources for minorities. Both Palm Beach and Broadcasting have failed to specify specific recruitment sources for women. The situation with regard to the person or job title responsible for administration and implementation of Morbak's EEO program is not clear. In its tendered application, Morbak stated that general partner Lawrence R. Baker would be assigned this responsibility. This was confirmed in the applicant's integration proposal which noted that Mr. Baker would "work fulltime at the proposed station in the position of General Manager" and that he "will be responsible for the station's Equal Employment Opportunity program. "However, this integration statement was withdrawn by the applicant in its May 10, 1990 amendment. Accordingly, Tyler, Morbak, Birk, Aragon, Palm Beach and Broadcasting will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

23. *Late-filed Amendments/Good Cause.* Pelican petitioned for leave to amend its application on July 12, 1990; Snyder petitioned for leave to amend its application on September 20, 1990. The last day for filing amendments as of right in this proceeding was January 10, 1990. The subject amendments were accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

24. *Late-Filed Amendments/Returned.* On January 8, 1990, Tyler submitted an amendment to increase its effective radiated power to 6 kilowatts. While the amendment was timely-filed, it was not signed by the sole general partner pursuant to the requirements of 47 C.F.R. § 73.351(a)(3). Tyler provided this signature on January 18, 1990, eight days after the last date for filing minor amendments as of right but offered no good cause for his failure to provide the required signature on the January 8th amendment. Accordingly, these amendments must be returned. [5] On January 11, 1990, one day *after* the last day for filing minor amendments as of right, Domencich submitted an amendment specifying maximum Class A facilities (6 kW/100 meters). It is Domencich's contention that this amendment is timely since the Commission's offices closed early on Friday, December 8, 1989, the release date of the *Public Notice* announcing the acceptance for tenderability of her application. Therefore, she alleges the release date should be deemed to be Monday, December 11, 1989, with notice occurring on December 12. Hence, Domencich alleges that January 11, 1990 is the last date for filing minor amendments as of right. We disagree. Even though the Commission's offices did close early on December 8, 1989, the *Public Notice* was, in fact, released. Therefore, pursuant to 47 C.F.R. § 1.4, notice occurred at 3 P.M. on December 11th and the first day to be counted is Tuesday, December 12, 1989. The last date in this calculation is January 10, 1990. Domencich's amendment, lacking any good cause showing, must therefore be returned.

25. *Late-filed Amendments/§ 1.65.* The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after January 10, 1990, the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

Applicants	Dates Filed
Peel	March 6, 1990
Sage	October 4, 1990
Triple J	September 5, 1990
Morbak	March 30, May 10, July 11 and August 31, 1990
Intermart	January 25, 1990; January 17 and February 8, 1991
Southern	November 19, 1990
Pal-Mar	March 2, 1990
Aragon	January 11 and November 30, 1990
Palm Beach	March 21, May 25, and November 27, 1990
Lighthouse	January 24, 1990
Mostella	October 23, 1990
Broadcasting	March 22, July 6 and August 24, 1990
JFBLP	January 28, 1991

[4] Meadows has not indicated specifically that her husband will also sever his connection with WPBF (TV).Therefore, a cross-interest issue will be specified in this instance.

[5] Consequently, Aragon's Motion to Strike the January 8, 1990 amendment will be dismissed as moot.

26. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

27. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

28. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to Tyler, whether its principal Bruce Lyons (if he dismisses his application to serve Brandon, Vermont prior to resolution of Issue 3 in MM Docket 90-636) was an undisclosed party-in-interest in Maxine Snow's Lebanon, New Hampshire FM application (File No. BPH-880126NX).

2. To determine whether Tyler violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the designation of character issues against other applicants in which one or more of its partners has or had an ownership interest and/or failed to report the dismissal of such applications (or termination of such ownership interest) with unresolved character issues pending.

3. To determine with respect to Tyler and Palm Beach whether the applicants are financially qualified.

4. To determine, from the relevant evidence adduced pursuant to Issues 1 through 3 above, whether Tyler possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine if the employment of Meadows' husband in a management capacity at WPBF-TV is consistent with the Commission's cross-interest policy and, if not, whether a grant of her application would be in the public interest.

6. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Stone, Intermart, Southern and Limited would constitute a hazard to air navigation.

7. To determine whether Tyler, Rieke, Birk, Pal-Mar, Gold Coast and Palau have reasonable assurance of the availability of their proposed transmitting antenna sites.

8. If a final environmental impact statement is issued with respect to Peel, Sage, Tyler, Bosler, Great Red, Owens, Meadows, Domencich, Snyder, Birk, Pal-Mar, Aragon, Palm Beach, Jupiter, Broadcasting, JFBLP, Gold Coast, Giles, KB, Palau and Carrus in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

9. To determine which of the proposals would, on a comparative basis, best serve the public interest.

10. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

29. IT IS FURTHER ORDERED, That Treasure's application IS HEREBY DISMISSED as inadvertently accepted for filing.

30. IT IS FURTHER ORDERED, That in the event a construction permit is awarded to JFBLP as a result of this proceeding, its grant will be without prejudice to: (i) whatever action, if any, the Commission may deem appropriate should former Graphic principals Yampol, Slodowitz and Finfer regain control of Graphic; the outcome of (ii) the appeal in *A.S.D. Answer Service , Inc. et. al.*, CC Docket No. 82-587 et seq.; (iii)*Utah Telecourier v. MCI Telecommunications Corporation et al.*, and (iv) the untitled complaint brought by the U.S. Securities and Exchange Commission in the District Court for the Southern District of New York alleging filing with the SEC of false, misleading and untimely statements.

31. IT IS FURTHER ORDERED, That Gold Coast is required to submit an amendment correcting the discrepancy detailed in paragraph 13 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

32. IT IS FURTHER ORDERED, That, the applicants specified in paragraph 14 hereinabove shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

33. IT IS FURTHER ORDERED, That, in the event of grant of any of the captioned applications, such grant shall be conditioned to require that program test authority may not commence until FM Station WQOL commences its program test authority on Channel 279C2 and a license will not be granted until WQOL receives its license to operate on Channel 279C2.

34. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

35. IT IS FURTHER ORDERED, That, in the event of grant of the Tyler or Meadows applications, Arthur Goodman or Mary R. Meadows will be ordered to sever all connections with WTRU-FM (Goodman) or WPBF-TV (Meadows), respectively, prior to the commencement of program test authority.

36. IT IS FURTHER ORDERED, That Sage and Pal-Mar submit the appropriate amendment concerning the Section II, Item 6 deficiencies detailed in paragraph 21 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

37. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Tyler, Morbak, Birk, Aragon, Palm Beach and Broadcasting shall submit Section VI

information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

38. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Peel, Sage, Triple J, Morbak, Intermart, Southern, Pelican, Snyder, Pal-Mar, Aragon, Palm Beach, Lighthouse, Mostella, Broadcasting and JFBLP ARE GRANTED and the corresponding amendments ARE ACCEPTED to the extent indicated herein, and that Tyler's January 8 & 18, 1990, Limited's October 10 (and October 15 supplement), 1990 and Domencich's January 11, 1990 amendments ARE RETURNED.

39. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

40. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

41. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

APPENDIX

1. To determine, with respect of F (Tyler), whether its principal Bruce Lyons (if he dismisses his application to serve Brandon, Vermont prior to resolution of Issue 3 in MM Docket 90-636) was an undisclosed party-in-interest in Maxine Snow's Lebanon, New Hampshire FM application (File No. BPH-880126NX).

2. To determine whether F (Tyler) violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the designation of character issues against other applicants in which one or more of its partners has or had an ownership interest and/or failing to report the dismissal of such applications (or termination of such ownership interest) with unresolved character issues pending.

3. To determine, from the relevant evidence adduced pursuant to Issues 1-3 above, whether F (Tyler) possesses the basic qualifications to be a licensee of the facilities sought herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-337

In re Applications of

GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION	File No. BPED-870727MA
LOWELL MAZE JACKSON	File No. BPH-870727MD
IVAN M. MILES	File No. BPH-870727ME
JOHNSON BROADCASTING, INC.	File No. BPH-870727MF
PAUL UHRY MAZO d/b/a MAZO RADIO CO.	File No. BPH-870727MJ
ROBERT W. ROUNSAVILLE	File No. BPH-870727MK
SOUTHERN RADIO SERVICES, INC.	File No. BPH-870727ML
EATHEL HOLLEY	File No. BPH-870727MQ

For Construction Permit for a New FM Station on Channel 298A in Roswell, Georgia

Appearances

Gene A. Bechtel, Esq. on behalf of Georgia Public Telecommunications Commission; *William H. Crispin, Esq.* and *Dean R. Brenner, Esq.* on behalf of *Lowell Maze Jackson*; *Gary S. Smithwick, Esq.* on behalf of Ivan M. Miles; *Lewis J. Paper, Esq.* on behalf of Johnson Broadcasting, Inc.; *Richard M. Riehl, Esq.* and *David G. O'Neil, Esq.* on behalf of Mazo Radio Co.; *Vincent A. Pepper, Esq., Neal J. Friedman, Esq.* and *Louis C. Stephens, Esq.* on behalf of Robert W. Rounsaville; *Lawrence J. Bernard, Jr., Esq.* on behalf of Southern Radio Services, Inc.; *Richard J. Bodorff, Esq.* and *Jonathan W. Emord, Esq.* on behalf of Eathel Holly; and *Charles E. Dziedzic, Esq.* and *Robert A. Zauner, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: May 9, 1991; Released: May 22, 1991

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of eight parties: Georgia Public Telecommunications Commission ("GPTC"), Lowell Maze Jackson ("Jackson"), Ivan M. Miles ("Miles"), Johnson Broadcasting, Inc. ("JBI"), Paul Uhry Mazo d/b/a Mazo Radio Co. ("MRC"), Robert W. Rounsaville ("Rounsaville"), Southern Radio Services, Inc. ("Southern"), and Eathel Holley ("Holley"). The eight applicants[1] are competing for the award of a permit to construct a new FM station on Channel 298A at Roswell, Georgia. Here, for reasons stated below, Ivan M. Miles is declared the winner.

2. The *Hearing Designation Order* ("*HDO*") DA 89-883, released August 16, 1989, 4 F.C.C. Rcd 6357, published at 54 Fed. Reg. 34817 (released August 22, 1989) sets the special and standard comparative issues for adjudication as follows:

> (1) To determine whether Sonrise Management Services, Inc. is an undisclosed party to the application of JBI.
>
> (2) To determine whether JBI's organizational structure is a sham.
>
> (3) To determine whether JBI violated Section 1.65 of the Commission's Rules and/or lacked candor, by failing to report the designation of character issues against other applicants in which one or more of its partners has an ownership interest and/or the dismissal of such ownership interest and/or the dismissal of such applications with unresolved character issues pending.
>
> (4) To determine from the evidence adduced pursuant to Issues 1 through 3 above, whether JBI possesses the basic qualifications to be a licensee of the facilities sought herein.
>
> (5) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (6) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

The burden of proceeding and the burden of proof on Issues 1 through 4 were assigned to JBI. The Presiding Judge then added the following issue against JBI:[2]

> (7) To determine whether JBI falsely certified its financial qualifications to the Commission.

See Memorandum Opinion and Order, FCC 90M-188, released January 30, 1990.

3. JBI's motion for summary decision on the third issue was decided in favor of JBI. *See Memorandum Opinion and Order*, FCC 89M-2535, released October 26, 1989. However, it was subsequently revealed that JBI was not incorporated until September 26, 1989, three business days after its motion to delete was filed. Therefore, it became necessary to determine whether JBI's principals were general partners whose other media interests had to be reported. Thus, the Presiding Judge added the following issues:

(8) To determine whether JBI or its predecessor, Capital Broadcast Group, violated Section 1.65 of the Rules of the Commission and/or lacked candor by failing to report various instances in which character issues were designated against other applicants orchestrated by Sonrise Management Services, Inc. in which one or more of its principals has an ownership interest and/or the dismissal of such applications in which unresolved character issues remain pending;

(9) To determine whether JBI made a material misrepresentation to the Commission with respect to its business form;

(10) To determine from the evidence adduced pursuant to the above issues whether JBI is qualified to be a licensee of the Commission.

See Memorandum Opinion and Order, FCC 90M-237, released February 7, 1990. The burden of proceeding on Issues 8 through 10 was assigned to Rounsaville and Miles and the burden of proof was assigned to JBI. *Id.*

4. The followings issue were added by the Presiding Judge against Southern:

(11) To determine whether Southern falsely certified its financial qualifications to the Commission.

(12) To determine whether Southern is financially qualified to construct and operate for three months without revenue.

(13) To determine under all the evidence adduced under the above issues [Issues 11 and 12] whether Southern is qualified to be a licensee of the Commission.

See Memorandum Opinion and Order, FCC 90M-249, released February 9, 1990. The burden of proceeding and of proof were assigned to Southern. *Id.*

5. By his *Memorandum Opinion and Order*, FCC 90M-215, released February 2, 1990, the Presiding Judge also added the following issues:

(14) To determine whether a prohibited *ex parte* contact in the form of a letter submitted on November 2, 1989 by Georgia State Senator Sallie Newbill to the Presiding Judge on behalf of the application of Lowell Maze Jackson violated Section 1.1200 *et seq.* of the Commission's Rules and if so, whether such violation warrants dismissal or disqualification;

(15) To determine whether the solicitation of letters of support from prominent and influential individuals and organizations in the Roswell area was an attempt to violate the Commission's rules prohibiting *ex parte* communications [47 C.F.R. Section 1.1200 *et seq.*] and, if so, whether there was an abuse of the Commission's hearing process by attempting to intimidate or unlawfully influence the Presiding Judge; and

(16) To determine from the evidence adduced pursuant to the above issues whether Lowell Maze Jackson is qualified to be a licensee of the Commission.

The burden of proceeding was placed on Rounsaville and Mazo who sought the issues, and the burden of proof was assigned to Jackson. *Id.*

6. Finally, in *Order* FCC 90M-203, released January 31, 1990, the Presiding Judge added the following issues against MRC:

(17) To determine whether Mark Taylor is an undisclosed real party in interest to the application of Mazo Radio Co. and whether its organizational structure is a sham; and

(18) To determine from the facts and circumstances adduced pursuant to the issues above whether Mazo Radio Co. is qualified to be a licensee of the Commission.[3]

The burden of proceeding was assigned to Rounsaville and the burden of proof was assigned to Mazo. *Id.*

Trial Procedures

7. This case was tried in two phases. A third phase was set but the party, New Georgia Broadcasting, Ltd., dismissed voluntarily before a hearing was held that had been set for October 30, 1990. *See Order* FCC 90M-2717, released August 29, 1990 (setting Phase III hearing date) and *Order* 90M-3447, issued October 30, 1990 (accepting New Georgia's voluntary dismissal). Prehearing conferences were held on October 17, 1989, and on February 22, 1990. Hearing sessions were held on March 13-16 and 18-21; and on May 15-18 and 21-23, 1990. Proposed Findings of Fact and Conclusions of Law were filed on July 20, 1990, and Reply pleadings were filed on August 24, 1990. As indicated above, it was anticipated that a Phase III hearing would be held on October 30, 1990. This case was not ripe for decision until after the Phase III issue was disposed of or the party was dismissed.[4]

8. There are qualifying issues to consider. This decision also addresses the comparative issues. Findings and conclusions are made in accordance with the Commission's standards at 47 C.F.R. §1.267(b). The burdens of proof on the issues are with the respective parties. This is an administrative proceeding tried under §5 of the Administrative Procedure Act [5 U.S.C. §§551 *et seq.*] and the preponderance of the evidence standard applies. *Steadman* v. *SEC*, 450 U.S. 91 (1981). Testimony is cited where practicable by the name of the witness followed by the transcript page number. References to exhibits are to the numbered exhibits of each applicant that were admitted into evidence. References to proposed findings and conclusions are introduced by "PFC," and to replies by "RPFC."

FINDINGS OF FACT

9. Since the applications are mutually exclusive, a consolidated factual hearing was conducted on all issues wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp.* v. *F. C. C.*, 325 U.S. 327, 333 (1945); *U. S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956) (parties have right to present oral and documentary evidence and to conduct cross-examination).

Comparative Coverage

10. The parties were required to submit evidence on comparative coverage for consideration of the areas and populations within the respective Grade B contours and the availability of other primary aural services of Grade B or greater intensity. The findings are based on Joint Engineering Exhibit 1 that was received in evidence on March 13, 1990. (Tr. 114.)

11. The following are the areas and populations which the eight applicants will cover within their respective 1.0 mVm contours.

Applicant	Population	Area Sq. km.
GPTC	421,300	1,760
As Amended	450,500	"
Holley	870,700	1,820
Jackson	513,200	1,840
JBI	642,700	1,800
MRC	603,100	1,810
Miles	648,500	1,810
Rounsaville	625,200	1,840
Southern	489,800	1,810

All prospective service areas have five or more fulltime primary aural services. (*Id.*)

Qualifying Issues

Johnson Broadcasting, Inc. (Issues 1 to 4 and 8-10)

12. JBI was organized as a Georgia corporation on September 26, 1989, with voting and non-voting stock. Frank W. Johnson ("Johnson") holds 100% of the voting stock which is numerical control, and 20% of the equity. Johnson also controls the corporation as its president, treasurer and sole director. Mary Ector is corporate secretary. (JBI Exh. 1.) Johnson also received an option to purchase 50 shares of voting stock on February 26, 1990, in return for a loan to JBI of $5,000. (Miles Exh. 19 at 2.)

13. The remaining 80% of the corporation's equity is owned by twenty five non-voting shareholders (2.963% each). (JBI Exh. 1.) Four of these non-voters also received on September 26, 1990, options for non-voting stock (NVS) in exchange for loans: Gerald M. Griffith received an option for 33 shares NVS for a $3,300 loan; Jack Keeler received an option for 268 shares NVS for a $26,800 loan; William M. Larkin received an option for 58 shares NVS for a $5,800 loan; and Hoyt Shehee received an option for 58 shares NVS for a $5,800 loan. (Miles Exh. 19 at 4-7.) Victor J. Wanner, Sr. ("Wanner") loaned JBI $500 but received no stock option. (Miles Exh. 19 at 1.) The evidence discloses that Wanner was a Sonrise salesman who had selected investors and who sold partnership interests to 15 of the initial partners. (Wanner, Tr. 2840-42.) Wanner held no positions with Sonrise other than sales representative on commission. (Wanner, Tr. 2761-62.)

14. JBI became a corporation after October 11, 1987, the "B" cutoff date.[5] Prior to that date, Johnson's venture was a general partnership called Capital Broadcast Group ("Capital") that was promoted, organized and structured by Sonrise Management Services, Inc. ("Sonrise"). The group consisted of the same 26 principals who were initially solicited by Sonrise, each of whom executed a general partnership agreement which gave the partners the right to designate a Managing Partner ("MP"). (Miles Exh. 10.) Johnson was selected on June 12, 1987, by an agent of Sonrise, Ronald Baptiste ("Baptiste"), to become the MP for Capital. (Miles Exh. 6 at 3.)[6]

15. Johnson first learned of the opportunity for a new FM station for Roswell in early June 1987, from a neighbor, Mr. Birdell Jackson ("Jackson"), who was at that time discussing the opportunity with Baptiste. (Johnson, Tr. 2351.) Mr. Jackson told Johnson that he had suggested to Baptiste that he meet with Johnson to discuss the opportunity. (Johnson, Tr. 2352.) Johnson was a likely candidate for Baptiste who was interested in locating a racial minority who lived in Roswell and who had broadcast experience. (Johnson, Tr. 2898-2901.) Jackson told Baptiste that Johnson was that person. (*Id.*) *See* Findings at Paras. 85-87, *infra*.

16. Johnson met with Baptiste on June 7, 1987, and Baptiste made it known that he was on a "talent hunt." (Johnson, Tr. 2370.) By that time, Baptiste knew that Johnson was a professor of communications who supervised an FM radio station that operated with a full-time paid staff. (JBI Exh. 5.) Baptiste described to Johnson the organization and resources of Sonrise as a successful venturer in the construction of cellular telephone systems and now interested in constructing FM broadcast stations. (JBI Exh. 5.) Baptiste told Johnson that Sonrise was organizing a group to file for a Roswell allocation and that Baptiste wanted Johnson to serve as MP. (*Id.*) Baptiste told Johnson that as MP he would have "sole responsibility for managing the group and making the decisions necessary to prosecute the group's application." (JBI Exh. 5 at 2-3.) Neither Sonrise nor Baptiste would have an equity interest in the venture. (*Id.*) But Baptiste advised Johnson that Sonrise had entered into "package" arrangements with an attorney, Thomas L. Root, and an engineer, Sachs-Freeman. (*Id.*) Root and Sachs-Freeman were paid directly by Sonrise from monies collected from the group (Johnson, Tr. 2553-54). According to Johnson, he understood from Baptiste that Sonrise "would retain the funds to be disbursed to the engineer and to the attorneys." (JBI Exh. 5 at 3.) But once the group was formed, Johnson, as MP, would make all of the legal and engineering decisions in consulation with Root and Sachs-Freeman. (*Id.*) Johnson testified that he understood that management consulting and start-up management services would be available from Sonrise, at the group's option. (Johnson, Tr. 2616-18.)

17. With Paras. 14 to 16 as background, the evidence is now considered with respect to control by Sonrise over funds that were used to prosecute the application, the formation of JBI, the corporation, and the failures of Root to file amendments related to the §1.65 issue [Issues Nos. 8 and 9].

18. Baptiste told Johnson that the partners would generate $90,000 to $150,000 in contributions. (JBI Exh. 8.) Johnson urges that the factfinder note that he personally visited Sonrise's office in Columbus, Georgia where he spoke personally with Ralph Savage ("Savage"), Sonrise's board chairman, and Eugene White ("White"), Sonrise's president. (JBI PFC at 4-5.) While Savage and White may have confirmed what Baptiste had said about Johnson having control once an agreement was signed, there was no mention of a key ingredient, i.e., how would the project be funded and what would be the role of Sonrise in the funding. (*See* JBI Exh. 5 at 3-4; JBI Exh. 8 at 4.) The evidence sponsored and relied on by JBI lacks any convincing evidence of diligence to pin down a reason-

able assurance that money raised through partner contributions of around $100,000 would not be mingled with other Sonrise funds, would be properly used for the benefit of Capital, and would be promptly sent to Johnson as the needs to meet prosecution expenses arose. The record contains no such evidence. Yet, Johnson contends that he did know that he "should rely on people who could be trusted to deal with [him] honestly and forthrightly." And for that reason, he sought back-up financing from friends. (JBI Exh. 8 at 4.) If Johnson accepted Baptiste's representations that $90,000 to $150,000 could be obtained from partners, Johnson as PM, should have assured himself that the money would be escrowed with a bank. This is particularly true since he did not trust Baptiste, White and Savage in view of Johnson's perceived need, early-on, for additional back-up financing.

19. After visiting Sonrise's office, Johnson was ready to sign documents. Without ascribing a specific date to the event, Johnson advised Baptiste he would join the group as MP. (JBI PFC at 5.) Johnson refused to sign a management contract with Sonrise which would have empowered Sonrise to perform "all acts related to the supervision and management of the operation and construction of the Station." (JBI Exh. 5 at Att. A.) On June 11, 1987, White sent Johnson a letter forwarding "copies of the General Partnership Agreement, Questionnaire and Application showing your ownership of 10.9% of the Roswell, Georgia Partnership." (Miles Exh. 6 at 1.) Also included was an undated form letter from Sonrise forwarding a "Certificate of General Partnership And Assumed Name" which listed 27 names and addresses, including Johnson's name as the MP. (*Id.*) It was signed by White, bears the date June 17, 1987, and makes specific reference to the Partnership Agreement. (*Id.*)

20. There are three documents that Johnson signed or completed on June 11, 1987: "Sonrise Management Services, Inc. Agreement For FM Radio Station Application" (JBI Exh. 5 at 1-3); "General Partnership Agreement" (JBI Exh. 5 at 4-6); and "FM Radio Station Applicant Questionnaire" (JBI Exh. 5 at 7-10.) The Agreement is a three paged form which describes Sonrise as "a corporation which prepares or causes to be prepared FM Radio License Applications to the FCC." The Agreement specifies that Sonrise will contract with others to effect the filing but those other persons are not identified. Fees required of Johnson were written in at $9,810, but Johnson did not pay any money to Sonrise when he signed. The partnership agreement is a form for the creation of a general partnership and Johnson's name is written in as the managing general partner. The Questionnaire reflects Johnson to be a 20.9% voting owner which does not coincide with the 10.9% recorded in the Certificate. (Compare Miles Exhs. 5 and 6.)

21. It is found as fact that the venture contemplated possession by Sonrise of funds collected from partners, control of which was not even shared with Johnson. And control was assumed by Sonrise over the selection of communications counsel and the engineer. It is found further that the reliance placed by Johnson on the perceived financial resources of Sonrise as primary source of JBI's funds for construction and operation is another substantial indicia of Sonrise's control over JBI's application.

22. On July 27, 1987, Root filed an application on behalf of JBI. (Miles Exh. 7.) The application Form 301 reflected that JBI was a corporation "in formation." (Miles Exh. 7.) Johnson had no role in selecting or in rejecting Root as counsel or Sachs-Freeman as engineer at that point in the enterprise, and Johnson has first-hand knowledge that Sonrise paid Root from Capital/JBI funds that were collected from the partners/shareholders. (Johnson, Tr. 2386-89.) But Johnson never asked to see any escrow documents. (Johnson, 2623.) And Johnson never asked Sonrise to permit him to exercise control over the funds. (Johnson, Tr. 2622.)

Section 1.65 Reporting Issues

23. In July 1987, prior to the filing of JBI's application, Root recommended that Johnson form a limited partnership with Johnson as the general partner and Capital Broadcast Group as the limited partner. Before agreeing on this arrangement, Johnson consulted with his local Atlanta attorney who recommended that he instead form a corporation. Johnson, without consulting Sonrise, instructed Root to file the application in the name of Johnson Broadcasting, Inc., wherein Johnson would be sole voting stockholder and Capital Broadcast Group would be sole non-voting stockholder. Root sent Johnson a copy of JBI's application, discussed it with Root and then signed and returned it to Root for filing. JBI's application was filed as Johnson had instructed Root. Root billed JBI for its incorporation at a fee of $600. (JBI Exh. 9 at Att. 3.) JBI was represented to be a "Georgia Corporation in - formation," with Johnson the sole voting stockholder and Capital Broadcast Group the sole non-voting stockholder. (JBI Exh. 5 at 5-7; Miles Exh. 7.)

24. Subsequent to Root's mid-July 1989 plane crash, Johnson decided to obtain new communications counsel. There are no specific dates or events to establish that Johnson was dissatisfied with Root or that he was looking for new counsel before or independent of publicity incident to the plane crash. It was not until August 18, 1989, about 30 days after the plane crash, that Johnson retained JBI's present counsel. (JBI PFC at 14.) Yet by July 19, 1989, Johnson had learned that after two years of Root's representation, JBI still was not incorporated. Johnson had inquired of the Georgia Secretary of State of JBI's status, and he reserved JBI's name in connection with that inquiry. (JBI Exh. 9 at 3-4.) Yet only nine days earlier, July 10, 1989, Johnson had written a lengthy letter to Root's law clerk, enclosing a proposed amendment to disclose that there were five non-voting shareholders[8] who are listed as limited partners in other FM applications having disqualifying character issues. None of those issues alleged misconduct on the part of any JBI partner. But the information was to have been reported under the Commission's disclosure rule.[9] (Miles Exh. 15; JBI Exh. 9 at 4; Johnson, Tr. 2550.) As was his way, Root never followed up to file the amendments, although it appeared from copies of correspondence that Johnson had signed and returned appropriate documentation on July 10, 1989, which had been requested of him by Root. (Miles Exh. 22.)

25. It is noted that a copy of Johnson's letter of July 10, 1989, was sent to Savage as indicated by the copy routing reflected on the letter. (*Id.*) This indicates that Johnson himself had directed a copy to Savage, an officer of Sonrise. Johnson did not deny sending the copy to Savage. It is also noted that disclosure of Miles Exh. 22 was contested by Johnson even after the hearing commenced

and even though there was a waiver of privilege appearing on the face of the document. *See Memorandum Opinion and Order*, 5 F.C.C. Rcd 4560 (Comm'n July 18, 1990).

26. Prior to Johnson signing the JBI application in July 1987, Root told Johnson that as the sole voting shareholder of a corporation, JBI was under no duty to report interests of non-voting stockholders to the Commission. As a result of that advice, Johnson made no inquiries of other stockholders to determine broadcast interests. (Johnson, Tr. 2642-43.) But in July 1989, after Root's plane crash, Johnson received informal legal advice about the "Sonrise" character issues added in other cases. He then prepared and sent a questionnaire to each of JBI's investors. (Miles Exh. 12; Johnson, Tr. 2548.) Johnson sent a further letter of explanation to the investors on August 9, 1989. (Johnson Exh. 9 at Att. 5.) In that letter, Johnson stated:

> I also need to know if you have invested in any other FM, AM or TV or other broadcast application or property in which you may have overlooked the disclosure requirements of the FCC.

(*Id.*) Then, on August 18, Johnson retained current communications counsel who also advised Johnson that although not yet incorporated, JBI could continue to represent itself as a corporation and that as a corporation, JBI was not required under FCC rules to report other broadcast interests of nonvoting shareholders. (JBI Exh. 9 at 6.) According to Johnson, it was based on that advice that JBI never filed a post-designation amendment to report the other broadcast interests of its non-voting stockholders. (Johnson, Tr. 2546-47.) It is noted that the *HDO* had set forth in Para. 5 the Sonrise related real party-in-interest issues set in 14 separate proceedings and it was stated in Para. 6 of the *HDO* that JBI had "failed to timely amend its application pursuant to 47 C.F.R. §1.65 to notify the Commission of the outstanding character issues."

27. New counsel advised Johnson in September 1989 to retain local counsel to complete the filing of necessary papers with Georgia's Secretary of State so that JBI could become a corporation. Since Johnson's appointment to meet with local counsel was scheduled to take place before September 21, 1989, JBI's new counsel apparently assumed that the corporate papers had in fact been filed before that date. In fact, the process took more than one meeting with local counsel. The corporate papers were not signed until September 25, 1989, and they were filed on September 26, 1989. (JBI Exh. 9 at 6-7.) In the meantime, JBI's new counsel had discussed with Johnson the filing of a motion seeking to delete, *inter alia*, the Sonrise related issues concerning JBI's failure to report other broadcast interests of its non-voting stockholders. For his part, Johnson did not see the pleading before it was filed on September 21, 1989. The reporting issue was deleted by the Presiding Judge based on JBI's representation that it was, in fact, incorporated. *See Memorandum Opinion and Order*, FCC 89M-2535, released October 26, 1989. Johnson later saw the filed pleading and the statement that JBI was a corporation, although the papers had not yet been filed.

Financial Certification

28. Baptiste had told Johnson that Sonrise had "substantial resources" and would insure that the applicant had financing for construction and operations. (JBI Exh. 8 at 1.) Financing would come from two sources: investors in JBI and a financial institution. (*Id.*) Johnson himself did not make a contribution for his voting stock. (Johnson, Tr. 2553, 2561.) Johnson did not know from direct knowledge whether other shareholders paid contributions. He assumed they did because he had seen Birdell Jackson give Baptiste a check for his investment and Johnson assumed that everyone of the other stockholders did the same. (Johnson, Tr. 2554-55.) Johnson calculated that contributions of approximately $133,000 were made. (*Id.*) Baptiste had explained that these monies from contributions of shareholders would be used up-front to pay legal fees, engineering fees, and commissions to Sonrise sales representatives. (*Id.*) But there is no evidence to show how those payments were apportioned.

29. Johnson has experience in operating a broadcast station. *See* Para. 87, *infra*. Baptiste had furnished Johnson a copy of the Sonrise brochure and Johnson relied on the brochure's estimated construction costs of $126,800. (JBI Exh. 8 at 2; Miles Exh. 8 at 31.) To confirm representations of Baptiste and the brochure, Johnson personally visited Savage and White and was satisfied with their assurances. (JBI Exh. 8.) Johnson also relied on his broadcast experience to estimate expenses for three month's operations at between $50,000 and $75,000. (JBI Exh. 8 at 2; Johnson, Tr. 2407.) Johnson made his cost assumptions from "mental notes" based on his experience in purchasing station equipment. (Johnson, Tr. 2406.) He made a range of estimates of $150,000 to $170,000. (Johnson, Tr. 2412.) But he was unclear in his testimony about estimated costs for auxiliary power, being unsure of the source for his estimate of $10,000 to $15,000, and not knowing whether the estimate was for one or two power sources. (Johnson, Tr. 2412, 2414.)

30. In June or July 1987, prior to certification, Johnson consulted Thomas Stokes for a second legal opinion. Mr. Stokes was a staff attorney with the SBA who taught communications law. Johnson consulted with Mr. Stokes for legal advice and paid Stokes a fee. Johnson was not seeking an SBA loan. Stokes recommended or suggested that Johnson seek back-up financing. (Johnson, Tr. 2472, 2474-75; JBI Exh. 8 at 4.) This evidence about the Stokes advice raises an inference that Johnson was not reasonably assured of Sonrise's financial resources. Stokes concluded that Johnson should have back-up financing in case Johnson did not agree with terms of financing that might be imposed by Sonrise, or "to have an option, something else in case that fell through." (Johnson, Tr. 2472.) This evidence indicates that Johnson was not sure of basic terms and conditions of Sonrise sponsored funding that was so lacking in specifics and assurances that some other option was needed.

31. JBI's application was filed on July 27, 1987. Johnson testified that he "did not know precisely how much [he] would need for back-up financing." (JBI Exh. 8 at 4.) Johnson contacted three individuals, one being J. Lowell Ware ("Ware"), publisher and owner of a non-profit weekly magazine *The Atlantic Voice*.[10] But Johnson and Ware did not discuss "specific figures" (Johnson, Tr.

2475.) Nor did Johnson give Ware any budget or other documentation. (Johnson, Tr. 2476.) According to Johnson's testimony:

> Mr. Ware nonetheless agreed to provide assistance if and when I needed it.

(JBI Exh. 8 at 5.) Johnson did not ask for or receive any documents concerning Ware's financial ability to make a loan. (*Id.*)

32. As a result of the financial issue being added against JBI, Johnson sought written verification from Ware. A letter dated April 27, 1990, from Ware to Johnson states its purpose: "to confirm our conversations in the summer of 1987." There is no date specified and there is no indication that the conversation took place before July 27, 1987. The letter indicates a willingness on the part of Ware to guarantee or loan funds. But no reference is made to a purpose, i.e., to construct and operate for three months a broadcast station, and there is no indication of an amount of money for which Ware would be guarantor or lender. Ware did not appear as a witness. The preponderance of evidence fails to show that the letter is not a mere accommodation. Also, the personal financial statement of Mr. Ware shows that of $824,000 in assets, $794,000 is represented by real estate, a non-liquid asset, leaving a credible balance of only $30,000.

Southern Radio Services, Inc.

Southern's False Financial Certification (Issues 11 to 13)

33. Southern is organized as a Georgia corporation and seeks integration credit for Anita Johnson ("A. Johnson") as controlling shareholder and Maurice A. Negrin ("Negrin") as a non-controlling shareholder who is the proposed sales manager. (Southern Exh. 1,4.) *See* Paras. 105 to 111, *infra*.

34. In Southern's application signed on July 24, 1987, and filed on July 27, 1987, Southern certified through A. Johnson's signature that it was financially qualified. (A. Johnson, 456-57.) In Southern's Form 301, A. Johnson was represented to be the only officer (President and Treasurer), the only director and the owner of 100% of the voting stock of the applicant.

35. Negrin was prepared to file in July 1987, for FM allocations in Mableton and Roswell, Georgia. (Negrin, Tr. 704-07.) Close to the filing deadline, counsel advised that contours of Mableton and Roswell overlapped. (Negrin, Tr. 710.) Negrin resolved the problem by abandoning Mableton and staying with Roswell. (*Id.*) The Roswell application as originally filed on July 27, 1987, listed Negrin as a non-voting stockholder. But on October 8, 1987, Southern filed an amendment for a corporate restructuring whereby A. Johnson became a 51% voting shareholder and Negrin became a 49% voting shareholder and a 90% non-voting shareholder. Negrin, acting without A. Johnson, also obtained the engineering services of William Culpepper ("Culpepper") in return for a 10% non-voting stock interest. (A. Johnson, Tr. 494, 497.)

36. A. Johnson saw Southern's application for the first time on the date that she signed it. (A. Johnson, Tr. 470-72.) She had no contact with the law firm that prepared the application and she did not know even the identity of the attorney. (A. Johnson, Tr. 487-88.) When asked to account for the factors she relied on for certifying "Yes" she answered:

> On speaking with Mo [Negrin], and his conversation with the bank that he had been dealing with, we were assured that we would have the money.

(A. Johnson, Tr. 457-58.) At the time of certification, there was no written budget or other document which estimated costs of construction and/or operation for three months. (Southern Exh. 7 at 1-2; A. Johnson, Tr. 604; Negrin, Tr. 762, 769.) While Negrin had himself concluded that a "ball park" estimate of $350,000 would be sufficient, there is no evidence that Ms. Johnson was furnished that figure, or Negrin's methodology in arriving at that amount, before she certified on behalf of Southern. (Negrin, Tr. 763-69; Southern Exh. 7 making no reference to A. Johnson's knowledge at certification).

37. Southern relies on a letter from the Buckhead Bank dated September 30, 1987. (Southern Exh. 6, Att. A.) The bank letter is signed by Arthur W. Rollins ("Rollins"), a vice-president. It is addressed to Negrin and it refers to discussions "Last July." (*Id.*) Negrin testified that Rollins had earlier engaged in banking business with Negrin over many years. (Southern Exh. 7 at 1.) Rollins indicates a willingness to lend Southern Radio up to $350,000 on the personal guarantees of all stockholders and their spouses, which would be repayable over five years at two points above prime. Payment of interest would not be due for six months and payment on principal would be deferred for two years. The letter reflects that Rollins did not know at the time whether Southern had been incorporated and there is no indication in the letter that Rollins was provided cost estimates or financial statements.

38. Ms. Johnson attended a meeting with Negrin and Rollins at the banker's office. But the evidence does not establish when the meeting took place. There is only a reference in Southern's PFC (at page 4) that "following" the conversations with Rollins, Ms. Johnson and Negrin completed Southern's application. But that mere assertion in a pleading does not establish a fact. However, the admission against interest that Ms. Johnson's financial statement was never presented to the bank is accepted as conclusive evidence of that fact. (Southern PFC at 4.) Nor are there any findings to be made about the meeting attended by Ms. Johnson who could not remember any relevant discussion except the general topic of the Roswell radio station and that it occurred "before we filed." (A. Johnson, Tr. 481-83.) Ms. Johnson did recall that Rollins said nothing at the meeting about making funds available to Southern. (A. Johnson, Tr. 483.) Thus, even if it is accepted that Ms. Johnson attended a meeting with Rollins and Negrin at a time before she certified Southern's application, she could not remember discussing the bank making available the sum of $350,000, or any amount of money. (A. Johnson, R. 481-83.) Thus, A. Johnson had no information from the Buckhead Bank on which to base a reasonable assurance of sufficient financing at the time she certified on Southern's behalf.

39. It is found as a fact that the bank did not ask for or receive a financial statement from Ms. Johnson or from any other Southern stockholder. The evidence that Negrin had done business with the bank over the years does not establish as a fact that the bank had a current financial statement or any financial statement. The bank would,

however, require current financial statements before it made any loan commitment. Also, there is no proof offered that the spouses of Southern's stockholders would sign guarantees although the bank required them. (*See* Southern Exh. 6, Att. A.) Based on the record, it could not be established without the testimony of Mr. Rollins that the bank letter was not an accommodation. Since Southern had the burden of proof, Southern had the obligation to produce Mr. Rollins as a witness, even if it required a subpoena. The failure on the part of Southern to produce Rollins will result in an adverse inference against Southern.[11]

40. Southern submitted a written budget estimate as a hearing exhibit. (Southern Exh. 6 at 2-3.) The break-down includes Tower Construction ($108,000), Equipment Costs ($33,935), Auxiliary Power ($6,500), Transmitter Site ($75,000), Equipment Installation ($10,000) and Other Construction Costs ($42,000). These items seem to be in order, except that the last item failed to take into account that as much as $37,000 was already spent in legal fees. (Negrin, Tr. 595-96.) This defect in the estimate is noted. But in view of work-out arrangements with counsel for future payments of legal fees, it is not so substantial as to reject Southern's budget. However, this does not alter the findings that there was no written budget prepared before certification and that Negrin did not review the application and estimated costs with Ms. Johnson in any detailed manner before she certified.

Mazo Radio Corporation

Real Party-In-Interest (Issues 17 and 18)

41. MRC is a Georgia corporation. Paul Uhry Mazo ("Mazo") is its sole voting stockholder with 20% of the equity. Charles E. Taylor ("Taylor") is the sole nonvoting stockholder and holds 80% of the equity. Mazo is MRC's president and director and Ms. Linda Angel ("Angel"), a non-stockholder, is the corporate secretary and treasurer. (Mazo Exhs. 1, 8, 13 and Tr. 3172-73, 3207-08, 3213, 3247.) Evidence has been introduced by MRC to show that Ms. Angel's services were obtained by MRC from A.B.&E., Inc., a corporation controlled by Mark Taylor. (Jackson Exh. 24.) James S. Grien ("Grien") is listed on the application as a corporate director. Grien owns no stock in MRC.

42. MRC is corporate successor to the application first filed as an individual by Mazo. (Mazo Exh. 1 at 1; Mazo Exh. 21; Tr. 3067.) MRC succeeded to Mazo's application in August, 1989, following the Commission's acceptance of an amendment that was filed on January 26, 1989. *Hearing Designation Order*, 4 F.C.C. Rcd 6357, (M.M. Bureau 1989). The amendment was received over opposition even though untimely filed. (*Id.* at Para. 4.)

43. Mazo resides in Savannah, Georgia, a distance of approximately 260 miles from Roswell. (Mazo, Tr. 3030.) Mazo owns and operates his own audio equipment rental business. (Mazo, Tr. 3039.) Mazo is a second cousin of Mark Taylor who is the father of MRC's 80% equity owner, Charles Taylor. (Mazo Exh. 7 at 1.) As long as fifteen years ago, Mark Taylor said he would help finance Mazo in a broadcasting venture. (*Id.* at 2.)

44. Charles Taylor is employed in his father Mark's real estate firm. (Mazo Exh. 10 at 5.) Prior to that he was an associate attorney at an Atlanta law firm. (*Id.*; Mazo, Tr. 3045.) James Grien, an MRC director, is associated with an investment banking firm, and is an attorney and a close friend of Charles Taylor whom he sees frequently. (Grien, Tr. 3239, 3249.) Grien has never attended a director's meeting and met Mazo for the first time at the hearing. (Grien, Tr. 3240.) Grien has not read the shareholder's agreement between Mazo and Charles Taylor. (Grien, Tr. 3257.) Nor has he seen any financial statement of Mazo's. (Grien, Tr. 3254-55.) Grien would not have agreed to serve as director if it were not for his relationship with Charles Taylor. In fact, Mazo had no knowledge of Grien's residence or citizenship. (Mazo, Tr. 3218.) It is found that Charles Taylor had influence over Grien as an MRC director and that Mazo had no influence over Grien as an MRC director.

45. Mark Taylor owns A.B.&E., Inc. ("AB&E"), a real estate sales and management company which provides office facilities and office personnel. (M. Taylor, Tr. 3390.) Ms. Angel is employed by AB&E as Mark Taylor's personal secretary. (M. Taylor, Tr. 3443.) Mark Taylor's permission was needed for her appointment as an officer and director of MRC. (M. Taylor, Tr. 3444.) Angel opened MRC's checking account (Tr. 3508), she has written all of MRC's checks (Tr. 3199), and she maintains MRC's public inspection file. (Angel, Tr. 3200.) She performs secretarial duties for Mazo and MRC as part of an AB&E facilities arrangement. (Jackson Exh. 24.) Under that agreement, MRC and Mazo share office space, personnel, and equipment at AB&E's office complex in Atlanta at a nominal cost of $100 per quarter or $33 per month. (*Id.*)

46. Charles Taylor has at least shared control with Mazo over the application's prosecution. Charles Taylor has agreed to provide the necessary funds (Tr. 3653) and as of the hearing he had advanced nearly $200,000.[12] (C. Taylor, Tr. 3186.) And there are no promissory notes to evidence a debt from MRC to Taylor. (C. Taylor, Tr. 3188.) A shareholders agreement was prepared by the law firm at which Charles was formerly employed and it was merely presented to Mazo to execute without his questioning its provisions. (Mazo, Tr. 3195.)

47. Charles Taylor testified that he was aware of the fact that as a non-voting stockholder, he was "not allowed to talk about the day-to-day operations of the corporation's business." (C. Taylor, Tr. 3644.) Specifically, the MRC bylaws, Article VIII, §8.02 provides:

> [Non-voting shareholders] shall [not] have the right to:
>
> (a) Conduct or control or participate in the control of the affairs or business of the Corporation, transact any business on behalf of or in the name of the Corporation, or have any power or authority to bind or obligate the Corporation.

(Jackson Exh. 26.) Notwithstanding that organic limitation, Charles Taylor, an attorney, was kept informed of case developments by Mazo, even to the point of including Taylor in three-way telephone conversations with MRC's communications counsel. (C. Taylor, Tr. 3645.) And in a specific matter, Charles Taylor made the decision with Mazo to drop Mark Taylor as a director and Mazo asked Charles Taylor to recommend a replacement. (C. Taylor, Tr. 3635.)

48. The corporate structure of MRC also contains a critical inconsistency. As noted above, Charles Taylor was a non-voting shareholder and as such he was prohibited from engaging in MRC's business affairs. Yet he was also a corporate director and directors as a governing body have broad corporate powers and responsibilities. (*See* Jackson Exh. 26, Article III at 4-5.) It made absolutely no business sense to place Charles Taylor in these mutually exclusive corporate positions. The absurdity of the anomoly raises a factual inference that the corporate format was a smoke-screen device to conceal that the true control of the venture was with Charles Taylor, aided and abetted by Mark Taylor and his company, AB&E. The factual nexus between Mazo and control by the Taylors is further evidenced in Mazo's Shareholders' Agreement: Under §1.6 entitled " *Non-Performance*, " Mazo can be terminated if MRC fails to achieve a profit on or after the second anniversary of receipt of its certificate to operate. (Jackson Exh. 23 at 9.) In that event, the "remaining shareholder," i.e. Charles Taylor, has the right of first refusal to buy-out Mazo. (Jackson Exh. 23 at 4.)

49. The evidence further establishes that the Atlanta law firm that structured the corporation was a former employer of Charles Taylor. The first choice of a communications attorney was Mark Taylor's own counsel who could not represent MRC only because of a conflict; MRC uses the same Atlanta accounting firm that represents AB&E and Mark Taylor's family investments; and the bank selected by Ms. Angel has been used by Mark Taylor for years on a regular basis. (Jackson Exh. 23 at 9-10; Tr. 3085-86; 3177; 3444-45; 3508-09.) Mark Taylor, not Paul Mazo, recommended Dwight Magnuson as a consulting engineer after Mazo had arrived in Atlanta. (M. Taylor, Tr. 3404; Mazo Exh. 11 at 7.) Mazo knew nothing about Magnuson. (Mazo, Tr. 3074.) Mazo testified that he retained Mr. Magnuson on July 23, 1987 (Tr. 3072) but the engineering portion of Mazo's application was signed by Mr. Magnuson one day earlier on July 22, 1987. (Mazo, Tr. 3074.) Mazo did not see the engineering portion of the application until July 24, 1987, the day he signed the application. (Mazo, Tr. 3076.) Magnuson recalls that either Mazo or Mark Taylor provided the site coordinates. (Jackson Exh. 28.) In the course of preparing the application, Mark Taylor told Mazo that he had obtained a transmitter site. (Mazo, Tr. 3081.) Mazo testified that he did not inform Mr. Magnuson about the proposed site. (Mazo, Tr. 3077.) From these facts it is concluded that Mark Taylor selected the engineer and the antenna site and Mazo merely went along with Taylor's decisions.

50. The motive to create a corporate sham to represent the true interests of the Taylors is apparent in the parallel efforts by Mark Taylor to obtain the FM station designated for Mableton, Georgia which is also a suburb of Atlanta (MM Docket No. 88-400). There, Mark Taylor's wife Judith was a principal of applicant Cobb Broadcasters. Ms. Angel performed the same secretarial and clerical duties that she now performs for MRC. (Angel, Tr. 3513.) Shortly before the Roswell filing window opened, Mark and Judith Taylor hired Magnuson to work on engineering for their Mableton application. (Jackson Exh. 28; M. Taylor, Tr. 3390-91.) Mark Taylor obtained a site letter and retained a communications attorney. (M. Taylor, Tr. 3462-63.) Margnuson confirmed that Mark Taylor was interested in the Roswell application. (Jackson Exh. 28; Mazo Exh. 11 at 6.) Mark Taylor contacted a site owner for a prospective Roswell site and he obtained antenna equipment cost estimates. (M. Taylor, Tr. 3397.) Mark Taylor also contacted Mr. Aaron Shainis,[13] the same communications counsel handling the Cobb Broadcasters' Mableton application, and asked Mr. Shainis about pursuing an application for Roswell. (M. Taylor, Tr. 3426.) Mr. Shainis advised Taylor to make a decision to continue to apply for Mableton or to drop Mableton and apply for Roswell. But the advice was given that both applications should not be sought simultaneously. (M. Taylor, Tr. 3426; Mazo Exh. 11 at 6.) Mark Taylor told Magnuson that he had decided to stay with Mableton. (Jackson Exh. 28.) But he also told Magnuson that Paul Mazo would be calling him about Roswell. (Jackson Exh. 28; Mazo Exh. 11 at 6.)

51. Sometime between July 20 and July 22, 1987, Mark Taylor telephoned Paul Mazo in Savannah, Georgia to determine whether he was interested in filing an application for Roswell. (M. Taylor, Tr. 3395-96; Mazo Exh. 11 at 6; Mazo, Tr. 3050-51.) Mazo had never been involved in an FCC application previously and he was admittedly unfamiliar with the process. (Mazo, Tr. 3053.) Mark Taylor offered to provide the funds for Mazo "to do whatever was necessary for [Mr. Mazo] to get this radio station." (Mazo, Tr. 3049.) Mazo and Mark Taylor never discussed a dollar amount for prosecuting the application or any limits on the funds that Mark Taylor would make available. (Mazo, Tr. 3110.) Mark Taylor offered the services of himself and his wife to assist Mazo in preparing and filing the application. (Mazo, Tr. 3050; Mr. Taylor, 3402.) The inference to be drawn from these circumstances was the decision to use Mazo to front for the Taylors' efforts to obtain an FM license that Mark Taylor would control in a suburb of Atlanta, Georgia. As insurance, Mazo was given a shareholders' agreement with a performance provision so onerous for a first-time manager that it virtually assured a reversion to Charles Taylor. *See* Para. 48, *supra*.

Lowell Maze Jackson

Jackson's Ex Parte Communication (Issues 14 to 16)

52. Jackson sent letters to seventeen Roswell community leaders in which he solicited community support for a new FM radio station to be located at Roswell.[14] (Jackson Exh. 9 at 1.) Each letter was identical and each was sent on September 11, 1989. (Jackson Tr. 2076; Jackson Exh. 9 at 1.) Each letter instructed the reader to mail his or her letter of support to Jackson and *not* to mail it directly to the FCC. *Id.* Jackson's letter stated specifically as follows:

> (5) Please do *not* mail. The letter will be hand delivered to Judge Sippel for you. Just place the following in a large envelope for LOWELL JACKSON, 4724 Maple Brook SE, Marietta, GA 30067.
>
> - Your original letter to Judge Sippel.
> - Copy of letter if possible.
> - Regular envelope addressed to Judge Sippel.

(Jackson Exh. 10 at Newbill Group 1.) (Emphasis in original.)

53. Jackson intended to have letters of community support filed, through counsel, as part of his direct case. As evidence of that intent, his letter suggested that the letters of support not be dated and that they be sent to him to be filed by his attorney with the Commission. (Jackson Exh. 9 at 1-2.) The letter stated:

> (3) It is probably best not to date the letter [of support], since it will be given to the Judge at his announced time.

(Jackson Exh. 10 at Newbill Group 1.)

54. Jackson's counsel was not involved with or consulted on initiating the letters. Jackson testified that the letters were "exploratory" and that if he received responses he would then take up with his counsel the question of using them to assist in his case. (Jackson, Tr. 2076-77; 2139.)

55. Jackson did not solicit any of the persons that he contacted to communicate directly with the Presiding Judge or with anyone else at the Commission. He testified that he did not even learn about the Commission's *ex parte* rules until he was deposed in November 1989, and that he never intended to violate a Commission rule. (Jackson, Tr. 2148; Exh. 9 at 4.) However, through inadvertence, State Senator Sallie Newbill sent a Jackson-drafted letter dated November 2, 1989, directly to the Presiding Judge. The letter stated:

> Dear Judge Sippel:
>
> As a friend of the court with vested civic interest, we wish to support the application of LOWELL MAZE JACKSON for a FM station for Roswell, Georgia.
>
> Our city is a family community with deep historic roots and a desire for the best quality of life for all our citizens.
>
> Mr. Jackson understands our community and could insure that the station enhances our future.
>
> Thank you for your receptivity to local input. We appreciate your sensitivity to letting Roswell's leaders be heard in this important matter.
>
> Very truly yours,

(*See Memorandum Opinion and Order* FCC 90M-215 [officially noticed] and Newbill Group 1 to Jackson Exh. 10.) The depositions of Senator Newbill and her secretary, Ms. Judy Hand, were admitted in evidence. (Jackson Exhs. 10 and 11.) The totality of the evidence establishes that Jackson thought that he had effectively instructed the recipents of his letter, and particularly Senator Newbill, to not communicate directly with the Presiding Judge. Jackson even spoke with Senator Newbill by telephone before sending her the letter. He asked her support in his efforts to obtain the Roswell station. (Jackson, Exh. 10 at 8-9; Jackson, Tr. 2087.) He also reviewed the instruction that was to be mailed to her which advised not to send the letter to the Presiding Judge. (*Id.*) State Senator Newbill testified:

> Q: At any time did Lowell Jackson tell you or suggest to you that you should communicate directly with Judge Sippel in this matter?
>
> A: No.
>
> Q: Did he tell you anything to the contrary?
>
> A: Yes, he told me to send the letter to him.
>
> Q: When did he tell you that?
>
> A: He told me that in conversation on the phone before I received this September 11th letter; and then, or course, in the letter it also states do not mail the letter to the Judge.

(Jackson Exh. 10 at 26-27.)

56. Senator Newbill had a busy office during the legislative session, during which time she received large quantities of constituent correspondence. (Jackson Exh. 10 at 11.) Jackson's letter arrived during a special session of the Georgia state legislature. (*Id.* at 10-11.) When she turned her attention to Jackson's letter, she had forgotten his restrictive instruction and passed the letter to her secretary with the hand written notation: "put this on my letterhead and send." (*Id.* at 13.) That instruction was followed literally by Ms. Hand and, in the course of those events, the Jackson instructional letter showed up missing. (Jackson Exh. 11 at 11.)

57. Several other recipients of Jackson's solicitation letter responded with letters of their own which they sent directly to Jackson in accordance with his instructions. (Jackson, Tr. 2078-87.) None of those letters reached the Presiding Judge or were filed with the Commission.[15]

Standard Comparative Issue

58. The issues for determination under the standard comparative issue are whether the applicants' coverage proposals reflect any significant difference in the size of the areas and populations which would receive service from the proposals [*HDO* at Para. 11], and to determine which of the integration proposals would, on a comparative basis, best serve the public interest [*HDO* at Para. 13]. *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 (Comm'n 1965).

Comparative Coverage

59. The parties were required to submit evidence on comparative coverage in order to permit consideration of the areas and populations within the respective Grade B contours and the availability of other primary aural services of Grade B or greater intensity. The findings are based on a Joint Engineer Exhibit that was received in evidence (Tr. 114). The exhibit contains data which conclusively define areas and populations proposed to be served by each applicant. These are set forth below along with the identity of ten existing aural services:[16]

Applicant	Area (sq. km.)	Population (1980 Census)
GPTC		
(original)	1,760	421,300
(amended)	1,760	450,000
Holley	1,820	870,700
Jackson	1,840	513,200
JBI	1,800	642,700
MRC	1,810	603,100
Miles	1,810	648,500
Rounsaville	1,840	625,200
Southern	1,810	489,800

(*See* Table II of the Joint Engineering Exh. 1.) None of the applicants proposes to serve any area that does not receive at least five radio services.

Media Diversification

Georgia Public

60. GPTC currently owns and operates eight FM radio stations, with a ninth FM radio station scheduled to commence operations in April 1990. These are as follows:

Call Sign	Location	Date
WACG	Augusta	1981
WJSP	Warm Springs	1985
WDCO	Cochran	1985
WXVS	Waycross	1986
WUGA	Athens	1987
WABR	Tifton	1987
WSVH	Savannah	1988
WWET	Valdosta	1990
WUNV	Albany	1990

(Georgia Public Exh. 1 at 6.)

61. GPTC currently owns and operates nine TV stations, as follows:

Call Sign	Location	Date
WGTV-TV	Athens	1988
WVAN-TV	Pembroke serving Savannah	1962
WXGA-TV	Waycross	1962
WJSP-TV	Warm Springs/ Columbus	1963
WABW-TV	Pelham	1965
WDCO-TV	Cochran	1965
WACS-TV	Dawson	1966
WCLP-TV	Chatsworth	1966
WCES-TV	Wrens	1967

GPTC has no plans to divest any of these stations (*Id.* at 10.)

Jackson

62. Neither Jackson nor his wife has any ownership interest in any radio station or radio station permittee. (Jackson Exh. 1 at 2.) He has never applied to the Commission for a construction permit to build and operate a radio station. (*Id.*) Neither he nor his wife has any ownership interest in any newspaper, magazine, advertising agency, movie theater, or cable system. (*Id.*) Jackson does hold a 33-1/3% limited partnership interest in Dalton Television Associates, Ltd. ("DTA"), the permittee of channel 23, Dalton, Georgia. (*Id.*) He pledged in his application, in his Integration and Diversification Statement, and in his written direct testimony to divest his ownership interest in DTA before his proposed Roswell station becomes operational. (*Id.*)

63. Jackson has been attempting to sell his limited partnership interest as he had promised to do in this proceeding. (Jackson, Tr. 1995, 2004-2045.)

Southern

64. Negrin, a voting stockholder, owns all of the stock of Milton Broadcasting Co., licensee of WWXX, Alpharetta, Georgia, and all of the stock of Bogie Broadcasting Co. Inc., the proposed assignee of WFEZ-FM, Williston, Florida. Negrin will divest his interests in these stations and sever all connections with them before SRS's proposed station begins operation. Negrin has also agreed to acquire an 11% non-voting interest in an application for a new FM station at Jupiter, Florida, but will be a completely passive investor in that venture. Southern's nonvoting stockholder, Culpepper, is an applicant for a new FM station at Chauncy, Georgia. Southern's other voting stockholder, Anita Johnson, has no attributable interest in any medium of mass communication. (Southern Exh. 5.)

Holley

65. Holley is the President, Treasurer, director and owner of 100% of the outstanding stock in WGKA, Inc., the licensee of WGKA(AM), Atlanta, Georgia. Holley is the General Manager of WGKA(AM). Holley is also the President, Treasurer, director and owner of 100% of the outstanding stock in Radio Newnan, Inc., the licensee of WNEA(AM), Newnan, Georgia. Upon grant of his application, he will resign all offices and directorships and divest himself of all stock interests he holds in WGKA, Inc. and Radio Newnan, Inc. He will also resign his position as General Manager of WGKA(AM) and will sever all connections he has with WGKA(AM), Atlanta, Georgia and WNEA(AM), Newnan, Georgia. (Holley Exhs. 2, 3.)

66. MRC argues that because Holley made no promise to turn in his station licenses if they could not be sold, and because Holley offered no evidence on how his daytime AM stations could be sold, Holley's divestment pledge should not be accepted. (Mazo PFC at 44-45; RPFC at 26.) However, by a pre-"B" cutoff amendment filed on October 5, 1987, Holley made an unconditional promise to surrender his ownership and all other interests and connections with broadcast stations WGKA(AM) and WNEA(AM). (Holley, Exh. 4.) Holley has persisted in his divestment commitment when exhibits were exchanged prior to commencement of the hearing (Holley, Exh. 2) and in his testimony at trial (Holley, Tr. 1551). Inconsistent positions taken by Holley with respect to his filing for Mableton while intending to file for Roswell and the absence of a divestment of ownership commitment in Mableton, do not negate the divestment commitments that Holley made for Roswell. (*See* Para. 114, *infra.*)

Other Applicants

67. Miles, JBI, MRC and Rounsaville have no interest in any medium of mass communication.

Best Practicable Service To The Public

Georgia Public

68. GPTC[17] is an agency of the State of Georgia. It was established in 1981 by an executive order of the Governor and operates under a charter which consists of an agreement between the State Board of Education and the Board of Regents of the University System of Georgia. (Georgia Public Exh. 1 at 1-2.) There are eight members of the Commission: the State Superintendent of Schools, three members appointed by the State Board of Education, the Chancellor of the University System of Georgia, and three members appointed by the Board of Regents. (*Id.*)

69. The members of the Commission are responsible for establishing policies for the operation of the stations licensed to it and, in that capacity, will review the operations of the Roswell station and set policies for its operation. None of the members of the Commission is expected to devote as much as twenty hours per week to the station. (*Id.* at 6.) Primary responsibility for the day-to-day operation of the station will be undertaken by Mr. Phil Goodman, a non-Commissioner. (*Id.* at 5.)[18] Georgia Public does not propose integration.

Lowell Maze Jackson

70. Jackson, a white male, has applied as a sole proprietor. (Jackson Exh. 1 at 1.) Jackson consulted an engineer, sought out and selected a tower site, and worked directly with communications counsel in the preparation and filing of his application. (*Id.*) Jackson proposes himself as general manager to work full-time at the station with ultimate responsibility for all aspects of operations. (*Id.* at 2-3.) Jackson is committed to leaving his present position as marketing consultant and would cease to engage in the selling or leasing of real estate in order to work full time (40 hours per week) at the station. (*Id.*)

71. Jackson has resided within his proposed service area for the past seven years. (Jackson, Tr. 1991.) Jackson has resided for most of his life in the Atlanta, Georgia area, where he attended school, college and graduate school, albeit not in the service area. (Jackson Exh. 1 at 3.)

72. Since 1986, Jackson was a member of the Historic Roswell Kiwanis Club, which met weekly to discuss local issues. (Jackson Exh. 1 at 4.) Jackson also is a member of the Club's Public Relations/Media Committee which assists in publicizing community projects. (*Id.*) But there is no evidence to pr[illegible]the frequency or depth of Jackson's involvement in the activities or in local Roswell or service area issues. Other associations in which Jackson maintained membership since July 27, 1987, are:

- Friends of Roswell Library
- Roswell Musical Arts Society
- Roswell Historic Society
- Friends of Bullock Hall
- Chattahoochee Nature Center
- Roswell Fine Arts Alliance

(Jackson Exh. 1 at 4.) But Jackson did not hold office, serve on committee, or attend meetings. (Jackson, Tr. 2038-40.) Also, these memberships acquired after Jackson's application was filed qualify only for minimal weight.

73. Jackson offered testimony that since 1986, he was a member of the Roswell Lions Club. (Jackson, Exh. 1 at 4.) But he equivocated on the accuracy of that representation as to the date when he was confronted with evidence of a membership card dated July 15, 1987. (Jackson, Tr. 2035-36.) Jackson testified that he did not know whether he was a member in 1986, acknowledged a membership card showing him to be a member as of July 15, 1987, and testified at hearing as to his deposition testimony as follows:

> A. I think what I was saying is that I didn't know if that was the first or the second membership card.

(Jackson, Tr. 2036.) But there was no deposition testimony offered and no hearing testimony establishing that Jackson held a membership card in 1986. (*Id.* at 2037.) Nor did Jackson offer into evidence or proffer an original or a copy of a 1986 membership card. It is concluded that Jackson was equivocating in his testimony concerning his date of initial membership in the Roswell's Lion's Club. Jackson's equivocation on dates of membership shows a lack of candor. This is important testimony because new memberships in 1987 at or about the time of filing would receive nominal to zero credit. Because of his lack of candor, Jackson receives no credit for local civic involvement.

74. Jackson is a deacon of a non-denominational church called The Church in Atlanta and, since 1985, he has directed part of its Sunday School. (Jackson, Tr. 2040-44; Jackson Exh. 1 at 5.) Jackson testified that he spends, on the average, six to eight hours per week on his Sunday School activities. The record, however, shows no connection between the Church in Atlanta, Roswell, and Jackson's civic activities.

75. Jackson worked as a full-time news director for an AM-FM station in 1967-68 where he reported directly to the station's general manager. He supervised a part-time news and sports assistant and announced sporting events. (Jackson Exh. 1 at 5.) From 1971 to 1981, Jackson was a media specialist for the Billy Graham Evangelistic Association. He coordinated programming with broadcast stations and other media and he produced and hosted radio shows in 27 cities. (Jackson Exh. 1 at 6; Jackson, Tr. 2001-03.) And from 1978 to 1980, Jackson was project director and host for a weekly Canadian TV series. (Jackson Exh. 1 at 6.) In 1981-82, Jackson produced and hosted a financial TV series in Atlanta. (Id. at 7.) In 1980-81, Jackson produced and distributed public service announcements. (*Id.* at 7-8.)

76. Jackson will install auxiliary power generators at the proposed studio and transmitter sites in order to insure that the station will remain operational in the event of a power failure. (Jackson Exh. 1 at 5.)

Ivan M. Miles

77. Miles, a white male, has filed as a sole-proprietor. (Miles Exh. 1.) He will integrate into the operation of the station as full-time general manager. He was born on December 21, 1914, and he will achieve his 77th birthday

this year. (Miles, Tr. 134.) Since 1914, Miles has resided in Atlanta, Georgia in residences that were within his proposed area of service. (Miles Exh. 1 and Tr. 145.) Miles will be credited with 55 years of local, service area residence, which eliminates remote dates as a youth from consideration. (*Id.*)

78. Miles has never before owned a radio station or filed before as a controlling applicant.[19] (Miles Exh. 1 at 1; Tr. 133.) He has been retired since 1988 and he has been on leisure travel since. (Miles, Tr. 150, 161, 169.) He was previously the owner of a broadcast engineering firm which he operated from his home. (Miles, Tr. 148, 189-90.)

79. Miles asserts that he will work 40 hours per week although he has never before worked as general manager of a broadcast station. (Miles, Tr. 140, 145.) He testified that he will work 40 hours per week for "as long as necessary." (Miles, Tr. 140-42.) He asserts that he will perform some engineering duties and that he will enter financial data into a computer in addition to carrying out his supervisory roles as manager. (Miles, Tr. 144-45.)[20] Miles testified that between 1984 and 1988 he had worked between 50 and 60 hours per week. (Miles, Tr. 206-07.) But in his direct case exhibit, he stated that he only worked part time in 1987-88. (Miles Exh. 1 at 3.)

80. At an earlier age during the 1930s, Mr. Miles was employed as a commercial radio announcer. In 1937, he became employed as a station engineer where he assisted in completing the installation of a transmitter and antenna. (Miles Exh. 1 at 2.) He was employed full-time as an engineer at Station WGST from 1938 to 1959. In 1957, he became WGST's operations manager and he supervised the station's programming as well as its engineering. (Miles Exh. 1 at 3.) In 1959, Miles became employed as chief engineer for Station WAOK in Atlanta. In September 1977, he became the director of engineering for Broadcast Entertainment Network, Inc. which owned five FM stations and four other AM stations. He terminated his employment in 1984. (Miles Exh. 1 at 3.)

81. Miles claims an enhancement credit for civic participation for his affiliation and work with the Tenth Street Methodist Church from 1968 to the present. (Miles Exh. 1 at 2.) Miles is a member of the Church's board of trustees as well as its official board. (*Id.*) The Church is located in Miles' proposed service area. (*Id.*)

82. The Tenth Street Methodist Church is an "inner-city church," serving people who live primarily in Atlanta. (Miles, Tr. 209-10.) No members of the Church reside in Roswell and the Church does not conduct religious services in Roswell. (Miles, Tr. 210.) There is another Methodist Church located in Roswell. (Miles, Tr. 211.) The Church maintains a Shepherd Center for elderly persons that provides visiting nurses and has a food bank (Miles, Tr. 210.) The Shepherd Center is supported by a number of Methodist Churches (Tr. 211) and individuals in Roswell take advantage of the services it provideds. (Miles, Tr. 211.)

83. Miles will install auxiliary power generators at his proposed studio and transmitter sites. He will also install a battery operated studio-to-transmitter link in order to assure transmission during periods of telephone or power outages. (Miles Exh. 2.)

Johnson Broadcasting, Inc.

84. The findings made earlier with respect to the proposal of JBI are incorporated herein by reference (Paras. 12 to 32, *supra*).

85. Johnson, a Black male, is committed to leaving his position as a professor at Georgia State University to work full-time as the station's general manager.

86. Johnson resided in Roswell between early 1984 and late 1985, and he has resided there since 1988. Between 1985 and 1988, he resided in Dunwoody, Georgia, a community that is located within JBI's proposed service area. (JBI Exh. 2 at 1.) Johnson also resided in 1964 to 1970 at a location in Atlanta that is on-the "fringe" of the service contour. (*Id.*)

87. From 1984 to 1988, Johnson held the position of director of public and technical services of Station WCLK-FM, Atlanta, Georgia and Cable Channel 3. He also held the position of executive director of a thirty minute program aired on WGNX-TV, Atlanta, Georgia. (JBI Exh. 2.) Johnson spent eight to ten hours per week working on the program. (Johnson, Tr. 2590.) From 1982 to 1984, he held the position of executive director, of the Atlanta Media Project. (JBI Exh. 2.) The project produced television programs for Cox Communications, Inc. (Johnson, Tr. 2591.) From 1979 to 1982, he held the position of general manager, WAMF-FM, Tallahassee, Florida. From 1974 to 1976, he held the position of consumer affairs reporter and producer, WBGU-TV, Bowling Green, Ohio. From 1972 to 1974, he held the position of assignment editor and reporter, WSB-TV, Atlanta, Georgia. (JBI Exh. 2.)

88. Johnson has participated as a speaker at a conference sponsored by the Southern Regional Office of the Internal Revenue Service of Atlanta in February 1987 concerning black history. He also participated in the Southern Christian Leadership Conference Drum Major Award Dinner in Atlanta in April 1985. He served as panelist and workshop participant in the Third Martin Luther King, Jr. Center for Social Change Film Festival in January 1987. He participated in hearings on minorities and women sponsored by the United States Commission on Civil Rights in 1984. Since 1982 to the present, Johnson participated in numerous activities for the Warren Memorial United Methodist Church in Atlanta, including co-chair of its Commission of Evangelism, chairman of communications committee, and member of its administrative board. (JBI Exh. 2 at 3.)

89. JBI proposes to install auxiliary services at the studio and at the transmitter site in order to ensure continued service in the event of any power outage. (JBI Exh. 3.)

Mazo Radio Company

90. The findings made earlier with respect to the proposal of MRC are incorporated herein by reference. (Paras. 41 to 51, *supra.*) If MRC is granted a permit for the Roswell station, Mazo, a white male, will devote a minimum of forty hours per week to the station as its general manager and he will be integrated into the day-to-day operations of the Roswell station. (MRC Exh. 1 at 1-2.)

91. Mazo asserts he will resign his current employment in order to fulfill this full-time integration commitment. (*Id.* at 2.) But it is noted that MRC offers no additional evidence to prove that he will leave an ongoing business

in Savannah, Georgia, the P. Mazo Sound Co., of which MRC is sole proprietor. Nor is there any evidence how Mazo would support himself for the first three months of operation while he is fully integrated into the station's operations.

92. As general manager, Mazo will have exclusive and ultimate responsibility for the management of the station and the supervision of all of the station's employees. (Mazo Exh. 1 at 2.) Mazo is proposed to oversee all aspects of the station's operations as well as setting program policy and sales policy at the station. (*Id.*)

93. Mazo proposes to relocate from Savannah, Georgia to Roswell, Georgia if MRC's application is granted. (Mazo Exh. 1 at 3.) But Mazo has not offered evidence on how he will continue operations of his sole proprietorship in Savannah, or how he will dispose of the business in an orderly manner. MRC's failure to produce such relevant evidence establishes a failure to prove his intent to leave Savannah for Roswell.

94. From 1966 through 1968, Mazo was an announcer at WBYB in Atlanta, Georgia. (Mazo Exh. 1 at 3.) From 1968 through 1970, Mazo was an announcer at WSGA, Savannah, Georgia. (*Id.*) Mazo has not specified whether these positions were full or part-time. For an unspecified period in 1971, Mazo was a production director at WZAT(FM), Savannah, Georgia and an announcer at WKXY, Sarasota, Florida. (*Id.*) Mazo served as station manager and chief engineer for WYND, Sarasota, Florida from Spring, 1972 to Summer, 1975. (*Id.*) Mazo is currently an announcer at WIXV(FM), Savannah, Georgia. (*Id.*)

95. MRC has not proposed to install an auxiliary power generator to operate the studio transmitter in the event of a power failure. (*See* Mazo Exh. 1.)

Robert W. Rounsaville

96. Rounsaville, a white male, filed his application as sole proprietor. (Rounsaville Exh. 1 at 1.) Since 1971, he has resided in Atlanta, Georgia, within his proposed service area. (*Id.*) Rounsaville lived in Roswell from 1964 to 1969 and, if he is granted the permit, he will move back to Roswell. (*Id.* at 2). Rounsaville will serve as full-time general manager with overall responsibility for the station's day-to-day operations. (Rounsaville Exh. 1 at 1.)

97. Rounsaville was born in 1916. He will achieve his 75th birthday this year. He was continuously involved in broadcasting from 1941 to 1982. He owned and managed twenty six broadcast stations, of which twenty one were AM, 4 were FM, and 1 was TV. Those stations served nineteen different principal communities and Rounsaville was the sole owner of twenty of them. During those forty one years, Rounsaville devoted his full working time to his broadcast stations. (Rounsaville Exh. 1 and Rounsaville, Tr. 308.)

98. During the early part of Rounsaville's broadcasting career, he resided in the communities where his stations were located. As a result, he has no local civic involvement. He served as general manager of WGAA-AM from 1941 until called to military service in July, 1943. He served as general manager of WBAC-AM, Cleveland, Tennessee between 1946 and 1948, when he moved to Atlanta. For a period of approximately eight months, Rounsaville managed the operation of his wholly-owned UHF TV station WATL-TV. (Rounsaville Exh. 1 at 2-6; Rounsaville Tr. 278-80.)

99. Since 1982, Rounsaville has been the sole proprietor of Robert W. Rounsaville & Associates, engaged in brokering broadcast stations and providing consulting services. (Rounsaville Exh. 1 at 6.) He prefers station ownership to the brokerage business. There are three persons in his employ whom he will retain as full-time employees at the station. (Rounsaville, Tr. 229.) His station manager would be Ms. Mary Bush Norwood who is one of these employees. Ms. Norwood has been Rounsaville's principal assistant in supervising broadcast stations since 1975. (Rounsaville, Tr. 230-31, 245.)

100. In addition to ownership of his brokerage firm, Rounsaville has spent the last three years producing a book entitled " *Radio Man* " which concerns his experiences in radio broadcasting. (Rounsaville, Tr. 256, 293.) The book has been completed and Rounsaville hopes that it will be published in 1991. (Rounsaville, Tr. at 258-259, 292.) Rounsaville has retained an agent to help him find a publisher and he expects to spend considerable time promoting the book. (Rounsaville, Tr. at 250-253, 257-258.)

101. Despite his interest in the book, Rounsaville testified that the Roswell station would be his first priority. (Rounsaville, Tr. at 288.) Rounsaville added that if the station "was doing tremendously well and did not need too much day-to-day attention, I might go on the road some and let Mary Bush stay there [at the station] and watch after everything." (Rounsaville, Tr. 291.) And, in addition to the pursuit of his book, Rounsaville plans to develop a forty eight acre tract in Orange County, Florida, which has been appraised at $4 million to $8 million. (Rounsaville, Tr. 259-260, 264-265, 305.)

102. The inference is raised by the cumulative effect of this evidence that Mr. Rounsaville, a 75 year old broadcast veteran, would not have time to fully integrate into the station while he marketed his book and developed a tract of land. It is clear that he will not spend forty hours at the station for each of the fifty two weeks of the year. But it is not clear how he would spend substantial periods of time away on other business and still be capable of managing all operations directly and through key employees. Therefore, Rounsaville's integration proposal will be rejected for a failure of proof.

103. Rounsaville will install auxiliary power at his studio and transmitter in order to maintain uninterrupted service. (Rounsaville Exh. 2.)

Southern Radio Services, Inc.

104. The findings made earlier with respect to Southern's proposal are incorporated herein by reference. (Paras. 33 to 40, *supra.*)

105. In July 1987, there were respective filing cut-off dates for FM allocations at Roswell and Mableton, Georgia. (Negrin, Tr. 704-07.) Negrin was interested in both stations and he attempted to enlist as an associate Mr. Bloomfield, an Afro-American minority with whom Negrin had worked as a fellow time salesman at Station WAOK. (*Id.*) For these preliminary efforts, Negrin employed the law firm of Arent, Fox, Kintner, Plotkin & Kahn ("Arent, Fox"), the firm which he had used in the past for communications ventures. (Negrin, Tr. 706.) Negrin also used the services of Mr. William Culpepper ("Culpepper") as engineer. He knew Culpepper from past experience and he negotiated an arrangement whereby

Culpepper would perform his services in connection with the Roswell venture in exchange for non-voting shares. (A. Johnson, Tr. 494, 497.)

106. Negrin was advised by his Arent, Fox counsel that he should drop one of the two proposals (Roswell or Mableton). (Negrin, Tr. 710.) He chose to drop his interest in the application for Mableton (which his associate Mr. Bloomfield continued to pursue) and he opted for Roswell through an affiliation with Ms. Johnson. (*Id.*)

107. The evidence establishes that Negrin was an officer, director and a 49% shareholder of Rainbow Broadcasting, Inc. ("Rainbow"), a Mableton applicant which had filed on July 10, 1987. (Negrin, Tr. 799.) Southern's application was filed on July 27, 1987. An amendment deleting Negrin from the Mableton application was not filed until October 8, 1987. (Negrin, Tr. 800-01.)[21] That same amendment proposed a stock structure modification that would make Ms. Johnson a 51% voting shareholder, with Negrin owning the other 49% of the voting power. Negrin also would own 90% of the non-voting shares and Culpepper would receive 10% of the non-voting shares. (Jackson Exh. 6.)

108. But the Southern proposal at the time of filing contemplated Ms. Johnson having absolute 100% numerical voting control. (Jackson Exh. 2.)[22] On July 24, 1987, she was to "be responsible for the prosecution of the FCC application." That was changed by amendment on October 8, 1987, wherein her voting interest was reduced to 51% and Negrin picked up his 41%. (Jackson Exh. 6.) Two days earlier, October 6, 1987, Southern became incorporated. (Southern Exh. 1.) Ms. Johnson was made President and a Director and Mr. Negrin was made Secretary and Treasurer. (*Id.*) Culpepper holds no position as an officer or as a director of Southern. (*Id.*) There was no explanation offered by Southern for the shift from Mableton to Roswell and the inclusion of Negrin as a close to numerical equal voting shareholder at or about the time that Negrin cut away from Mableton. This demonstrated ability of Negrin to keep his options open up until "B" cut-off is an indicia of his control over the prosecution of the application to a degree that in the total context of Southern's proposal warrants denial of credit for Southern's integration.

109. There are additional factors of *de facto* control being exercised by Negrin. The application was initiated by Negrin as promoter. (*See* Paras. 33 to 40, *supra.*) Negrin selected communications counsel and the engineer, the two key navigators on a broadcast venture. When the application was signed by Ms. Johnson as the putative principal in control, she was spoken to twice on the telephone. She appeared in Negrin's office and signed an already prepared application on which her name had been typed on July 24, 1987, the first day that she had ever seen the instrument. (A. Johnson, Tr. 470-72; 490; 572-78.) Ms. Johnson had no contact with the Arent, Fox counsel who had prepared the application; she did not even know counsel's identity. (A. Johnson, Tr. 487-88.) She took no part in negotiations with Culpepper when he agreed to take non-voting stock in return for his services. (A. Johnson, Tr. 491-94.) She relied on what Negrin told and instructed her with respect to financial certification. (*See* Paras. 37 to 40, *supra.*) And once designated treasurer, Ms. Johnson never maintained Southern's bank account or checkbook. (A. Johnson, Tr. 534.) She had nothing to do with selection of an antenna site (Tr. 500-03) or with selecting new counsel Mullin, Rhyne, Emmons & Topel (Tr. 518-20), or Lawrence J. Bernard, Esquire (Tr. 592-93). To the date she testified, Ms. Johnson did not even know the identity of the local attorney who had prepared the corporate documents. (A. Johnson, Tr. 516-17; 591.) She did not attend any organization meeting and no meeting agenda was cleared with her. (A. Johnson, Tr. 587.)

110. On the other hand, Negrin initiated the application, made the contacts with the Arent, Fox firm, (Tr. 706-07), handled all substantive dealings with the engineer (Tr. 493-94), and handled all banking matters which included using his own bank (Tr. 534, 563). He chose and secured the antenna site (Tr. 732-34), chose new counsel (Tr. 720, 810) and chose local counsel who had performed previous legal services for him (Tr. 713-14). These *de facto* performances in furtherance of the prosecution of Southern's application show Negrin to have been in exclusive control of all material events effecting Southern's proposal.

111. Even critical documentation reflects an ever increasing shifting of control to Negrin. On September 29, 1989, Southern filed and exchanged an Integration and Diversification Statement ("IDS") that represented Ms. Johnson as setting the policy for and supervising "all the station departments." (Johnson Exh. 5.) Then, when written testimony was exchanged in February 1990, it was disclosed that she and Negrin would "jointly establish all station policies - - - including the financing of construction and operation, selection of entertainment formats, budgets and size of staff." (Southern Exh. 4.) Integration sealed the scope of involvement when the IDS was filed and exchanged. The evidence above is inconsistent with the representation that Ms. Johnson would ever control station operations. Also, a party will not be permitted to alter its written representations to meet the facts of day-to-day control.

Eathel Holley

112. Holley, a white male and an experienced broadcaster, has resided in his proposed area of service for 28 years, and he plans to move to Roswell. (Holley Exh. 2 at 2.) He first learned of a channel being allocated for Roswell in 1982. He acquired that information from Bromo Communications, a consulting firm that had conducted a channel study for Holley. (Holley, Tr. 1519, 1596-97.) Bromo identified Channel 298 as the only one available. (Holley, Tr. 1519.) But that advance intelligence was allowed to lay fallow, and Holley states that he did not become aware that an actual allocation had been made until reading about it in a trade journal in June or July 1987. (Holley, Tr. 1519-20.) Evidence of the trade journal was never introduced.[23]

113. In the meantime, Holley was working on a Mableton proposal which was almost completed when he learned of the Roswell allocation. (Holley, Tr. 1520, 1597, 1618.) Holley dismissed his Mableton application on July 24, 1987, three days before filing for Roswell.

114. But Holley appears to have been well along with his Roswell investigation before he filed in Mableton. Holley testified that when he filed for Mableton he had already made up his mind that Roswell was his primary interest. (Holley, Tr. 1603-04.) Yet, Holley testified that when he filed for Mableton, he intended to work full-time at Mableton. (Holley, Tr. 1604.) Holley testified that no

thought had been given to his ownership of the two AM stations when he filed for Mableton, although he did testify:

> It was our intention to divest ourselves in (sic) the day to day management of both of the AM stations, not necessarily ownership, but the day to day management, so we could devote full-time to the Mableton proposal.

(Holley, Tr. 1606.) This testimony lacks candor. First of all, Holley had an inconsistent strategy in mind to seek a Roswell license before and during the time that he filed for Mableton. Thus he could not have intended to work full-time at Mableton. Also, at that time, Holley had no plan in mind on how to divest ownership of the two AM stations. It is unaccepted that a person of Holley's experience and sophistication in matters relating to the broadcasting business would not think about and focus on the divestment of local stations after filing for Mableton. Holley later knew enough to commit to divestment shortly after filing for Roswell on July 27, 1987. (Holley, Tr. 1607.) But from July 10, 1987 to July 24, 1987, no thought was given to ownership divestment in connection with the Mableton application. Only the divestment of day to day management was considered which would be more difficult, if not impossible, to effect.

115. And there are other concerns about Holley's credibility. He testified that there were two reasons for switching from Mableton to Roswell: First, Holley thought that there would be fewer applicants for Roswell (Tr. 1610); and second, Holley considered Roswell to be more upscale and therefore a better market for a classical music format. (Holley, Tr. 1611-13.) Those reasons are accepted as truthful ultimate answers. But the testimonial route to those conclusions was tortuous. Counsel for Jackson on cross-examination asked Holley if there were two reasons why he elected to dismiss his Mableton application. He answered: "I am not certain." (Holley, Tr. 1608.) Holley had previously testified to that information in a deposition and the transcript of that deposition was needed by counsel to obtain answers. (*See* Holley, Tr. 1608-10.) When asked whether the second reason was the "primary reason," Holley answered: "That's difficult to respond to accurately." (Holley, Tr. 1610.) When shown a Holley document entitled "Budget Summary" dated July 1987, and asked whether it was prepared in June 1987, the answer was: "Possibly, I am not certain." (Holley, Tr. 1613.) That answer was quickly turned by Holley into a "probably." (*Id.* at 1614.) When shown the budget (Miles Exh. 4) Holley identified it as a Roswell budget that was prepared in June 1987. (Holley, Tr. 1614.) But Mableton apparently had been filed without a budget even being prepared. For as Holley testified:

> This [Roswell] budget is the result of our attorney requesting us to furnish him with a proposed budget. Now whether Mableton get that far or not I am not absolutely certain.

(Holley, Tr. 1615.) There also seemed to have been no reasonable assurance of a Mableton site:

> Q. - - - did [Mableton] envision a different transmitter and studio site?
>
> A. I am not absolutely certain. That is not a decision that we had to make when the application was filed.

(Holley, Tr. 1616.) Yet later in his testimony, Holley testified to the contrary that even though he had opted for Roswell, he nevertheless went forward with Mableton because he had "invested a good deal of time in finding a site for Mableton and tying it down." (Holley, Tr. 1618.)

116. Holley is not credible as a witness. The inference will be drawn against him that there had been no budget prepared and no site obtained in connection with Mableton's application or that the same budget prepared for Mableton and the same site obtained for Mableton were used for the Roswell proposal. Either interpretation establishes that Holley was less than candid in his proposals to the Commission and in his testimony before the Presiding Judge. The evidence also establishes that Holley had filed a Mableton application never intending to construct a Mableton station or to integrate himself into the management and operation of a Mableton station or to divest ownership of his AM stations. In those particulars, Holley has demonstrated a propensity to be less than candid with the Commission.

117. Holley proposes to integrate himself in the Roswell station as full-time general manager. As such, his duties will include development of all policies for all departments and operations. He will supervise all station employees and be responsible for their hiring and firing. (Holley Exh. 2 at 1.)

118. Holley represents that upon grant of his application, he will resign all offices and directorships and divest himself of all stock ownership interests that he holds in WGKA, Inc. and Radio Newnan, Inc., and that he will resign his position as General Manager of WGKA(AM) where he works 40 hours per week as general manager. (Holley, Tr. 1551.) He intends to sever all his connections with WGKA(AM), Atlanta, Georgia and WNEA(AM), Newnan, Georgia in order to effectuate his commitment to work full-time at his proposed station. Holley represents that he will withdraw fully from, sever all of his connections with and completely discontinue any business with which he is now or may in the future be associated in order to fulfill his full-time integration commitment. (Holley Exh. 2 at 1-2; Holley, Tr. at 1551.) But there is no evidence on how he will effectuate his plans to leave his AM stations and there is no evidence on who will operate them when Holley leaves. Nor is there an unqualified pledge to sell. While Holley has made timely written commitments to divest which are sufficient to avoid a diversification demerit (Paras. 65-66, *supra*), Holley has not offered substantial evidence on how he will terminate his ownership of the business of operating the AM stations so as to permit him to become 100% integrated into a Roswell station.

119. Holley has established himself as a long-term resident of the service area. (Holley Exh. 2.) For civic involvement, Holley relies on his membership in the High Museum of Art, the Atlanta Historical Society, and the Peachtree Presbyterian Church. (Holley Exh. 2 at 2-3; Holley PFC at 120.) In 1989, after filing his application, he attended 8 of 9 meetings of the Art group of which he has been a member since 1985. (Holley, Tr. 1554.) But there is no evidence of the number of meetings attended prior to July 1987. Holley is not an officer or a director and only attends meetings. The group is involved with

preserving local art of metropolitan Atlanta that includes Roswell. There was no evidence offered of activities taking place in Roswell.

120. Since 1985, Holley has attended meetings of the Atlanta Historical Society. That group includes the Current Historian which is involved with preserving the history of metropolitan Atlanta. (Holley Exh. 2 at 3.) Holley has given input as to certain exhibits which were displayed in 1989. (Holley, Tr. 1628-29.) But he is not an officer or director, his input is not specific, and there was no evidence offered of events taking place in Roswell. One exhibit included pictures about Atlanta which include some pictures of Roswell scenes. (Holley, Tr. 1628.) But Holley did not have any responsibility in organizing the exhibit. (Holley, Tr. 1629.)

121. Roswell residents do attend the Presbyterian Church. Holley actively participates with a Sunday School group. (Holley Exh. 2 at 3; Holley, Tr. 1556-57.) But he is not a church member and he holds no office in the church or in the Sunday School group. He does provide financial support and he attends a lecture and dinner each Tuesday. (Holley, Tr. 1584-85.) The Sunday School participates in various community activities such as providing homeless shelters, food donations and building homes for the needy. (Holley, Tr. 1631-34.) Holley has participated in housebuilding activities approximately 12-24 times over the past two to three years, after filing his application. No housebuilding activities ever have taken place in Roswell. (Holley, Tr. 1634-35.) While all of the activities of the Sunday School Class of the Presbyterian Church were conducted within the 1 millivolt contour of the proposed Roswell station, Holley could not state that any of the activities were performed in Roswell. (Holley, Tr. 1634.) Nor did Holley deliver any food to people in Roswell. (Holley, Tr. 1637.)

122. Holley has acquired substantial broadcast experience from 1945 to the present. He is the sole owner and chief executive of WGKA, Inc., since 1976, the licensee of Station WGKA(AM), Atlanta. (Holley Exh. 2 at 1.) He also owns and controls Radio Newman, Inc., since 1975, the licensee of Station WNEA(AM), Newnan, Georgia. (*Id.*) Holley is the full-time general manager of WGKA and spends in excess of 40 hours per week at the station. (Holley Exh. 2; Holley, Tr. 1550-51.) He spends about one afternoon per week at WNEA. This has been Holley's schedule for several years. (Holley, Tr. 1551.) From November 1963 to February 1974, he owned the licensee of Station WLTA-FM in Atlanta. As noted above, Holley has pledged to divest, but he has not offered substantial evidence to prove that he has an effective plan, including the identity of personnel, to continue the broadcasting business when he leaves for Roswell.

123. Holley proposes to install an auxiliary power generation system at his proposed main studio and transmitter sites. (Holley Exh. 3 at 1.)

CONCLUSIONS OF LAW

124. Section 307(b) of the Communications Act requires the "fair, efficient and equitable distribution" of broadcast service and an assessment of the evidence must be made under the applicable Commission standards in determining which applicant meets the statutory standard. *See Policy On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965).

125. The primary concerns under the Act are: (1) maximum diffusion of control of the media of mass communications or diversification; and (2) best practicable service to the public. *West Michigan Broadcasting Co.* v. *F. C. C.*, 735 F.2d 601, 603-07 (D.C. Cir. 1984). Thus, comparative credit will be awarded to applicants which are without other media interests. The "best practicable service" standard includes the integration of ownership and management and the enhancement of such integration by local residence, civic activities, broadcast experience and minority and female gender preference.

Basic Qualifications

126. Before conducting the comparative analysis, a determination of the basic qualifications of JBI, Southern, MRC and Jackson must be made. *Louis Adelman*, 28 F.C.C. 432 (1960), *recon. denied*, 29 F.C.C. 1223 (1960), *aff'd sub nom., Guinan, et al* v. *F.C.C.*, 297 F.2d (D.C. Cir. 1961).

Johnson Broadcasting, Inc.

Party In Interest And Sham

127. Issues were set in the HDO against JBI (Issues 1 and 2) to determine whether Sonrise was a real party-in-interest and whether JBI was a sham applicant. The JBI venture was promoted and organized by Sonrise through its agent, Baptiste, its consulting engineer Sachs-Freeman, and its counsel Thomas Root. Sonrise recruited the initial partners. Sonrise recruited Johnson to be the managing partner. Sonrise selected the engineer consultant and the communications attorney. Johnson never spoke to the engineer or tower site owner and except for requiring a corporate form, he played no role in the preparation of Form 301. The organizational documents also were prepared by Sonrise (Sonrise Agreement and General Partnership Agreement).

128. There were specific incidents of the venture which indicate the exercise of control by Johnson independent of Sonrise. When the application was filed in July 1987, Johnson instructed Root to file as a corporation while Root was inclined to file as a limited partnership. Root filed on behalf of JBI as a corporation in formation and then continued to mislead Johnson on JBI's status as a corporation. It was only after Root's plane went down in July 1989, that Johnson discovered the true state of affairs and retained new counsel to complete the applicant's incorporation. But from 1987 to 1989, Sonrise retained control over JBI's legal affairs through Root. This conclusion is reached because Johnson took no steps to fire Root or replace him with another attorney, even though Root was not carrying out Johnson's instructions. That conclusion also is based on Sonrise's continuous possession and control of the funds paid to it by the JBI partners-shareholders which were used by Sonrise to pay Root's legal fees during this period. Certainly, Root was rendering legal services for the entity that paid his fees. And even though the advice was given to JBI, for whatever it might have been worth, there was sufficient commonality of control between Sonrise and JBI to find that Root was advising both Sonrise and JBI with respect to JBI's application.

129. As further evidence of acting independent of Sonrise, Johnson refused to sign a management services agreement with Sonrise which would have given Sonrise,

by express contract, direct control over supervision and management of the station's construction and operation. (*See* Findings at Para. 19.) However, the evidence discloses that Johnson was given 27 partners by Sonrise and he was named Managing Partner by Sonrise. He was not selected by the investors as a Managing Partner - he was selected for that position by the venture's promoter and stake-holder. These 27 partners paid their money to Sonrise and Sonrise never surrendered possession or control over their funds. Furthermore, Johnson had no financial investment, i.e., his money was not at risk until he retained new counsel two years after filing. It has been long recognized that a most effective method for controlling a business is through control of its finances. *Heitmeyer* v. *F. C. C.*, 95 F.2D 91, 99 (D.C. Cir. 1937). In determining control, the Commission focuses on "control of finances." *See Dorothy J. Owens*, 5 F.C.C. Rcd 6615, 6617 (Comm'n 1990). It is concluded as a matter of law that Sonrise participated substantially in the control over the JBI application, even after the application was filed, through its control over funds and the payments to JBI's counsel and engineer-consultant.

130. There also is documentary evidence that provides support for the conclusion that Sonrise was in continuous control over JBI's application as late as July 1989. In a hotly contested issue concerning document discovery,[24] a letter dated July 10, 1989, from Johnson to Root's law clerk acknowledges that:

> Johnson Broadcasting, Inc. (i.e. Capital Broadcast Group) is an applicant for a construction permit for a new commercial FM broadcast station to be licensed in Roswell, Georgia. Both were represented by Sonrise, and to my knowledge, still are represented by Sonrise.

(Miles Exh. 22 at 2.) The language of Johnson's own letter, an admission against a party's interest, discloses that:

> I want to participate as a general partner and managing general partner as a 'real party in interest' in the application process for a construction permit for a new commercial FM broadcast station to be licensed to Roswell, Georgia. But I also would like to feel assured that the management firm of Sonrise is legitimate and is operating above board and above reproach. I hope to hear from you on how I can go about more fully participating in the application process as defined in Mr. Root's memo dated January 3, 1988.

(Miles Exh. 22 at 3.) As further evidence of Johnson's adhering to Sonrise's control, the letter was copied to Savage, Sonrise's chairman. This evidence shows that as late as July 1989, almost two years after the application was filed, JBI was still relying on Sonrise for direction. In fact, up until trial, JBI was asserting an attorney-client privilege as to this document which legal position requires a community of interest between JBI and Sonrise since a copy had been sent to Savage.[25]

The "Sham" Issue

131. While the evidence discloses that the JBI application was under Sonrise's control for two years after the application was filed, significant events occurred after Root's July 1989 plane crash that shifted control to JBI and Johnson. Johnson retained a new communications counsel in August 1989, Johnson contacted Sonrise for a financial accounting, Johnson saw to it that JBI became incorporated in September 1989, and Johnson contacted JBI shareholders to inform that he was in command of the venture and that he was seeking information of any FCC applications involving shareholders that had adverse issues. (*See* Miles Exhs. 9 and 11.)

132. In the case of *KIST Corp.*, 102 F.C.C. 2d 288, 292 (Comm'n 1985), the Commission held that an integration proposal was a sham where the named controlling owner had no investment in the application, was not involved in the application and there was little likehood that she would become involved in the future. The Commission later found the absence of a sham where the person proposed for integration held only a 10% equity interest, paid for through a loan from a large equity owner, and where she had retained local counsel and had decided that the applicant should proceed as a corporation. *Susan S. Mulkey*, 4 F.C.C. Rcd 5520, 5521 (Comm'n 1989). Here, by the time the case was tried, Johnson had established himself as the person in charge of the application. He had hired a new communications counsel and he had contacted the limited partners to advise them of recent developments and he sought adverse information that would be reported under §1.65. JBI continues to have problems in its qualifications as an applicant. But in view of Dr. Johnson's herculian efforts to salvage a debilitated venture, the stigma of a sham is not a basis for its disqualification from comparative consideration.

False Financial Certification

133. The findings reflect that Johnson relied on oral representations from Baptiste and Savage that funds ranging from $90,000 to $150,000 would be raised through the contributions of limited partners. *See* Paras. 18, 28-32 *supra*. But these were merely oral assurances of expectancies from limited partners who were unknown to Johnson when he certified in July 1989. And even if it were reasonable to rely on Sonrise's expectations, there were no provisions set for escrowing contributions from JBI partners to Sonrise. The failure of Johnson to insist on proper escrowing and accounting for funding resulted in the comingling of funds with Sonrise's general operating funds. The loss of control by Johnson over these funds to the Sonrise entity, which was not an investor and which did not operate under any management contract of accountability, are circumstances that negate any reasonable assurance that partners' contributions would be available for construction and operation. And Sonrise never provided Johnson with verification of its assurance that it could also obtain financing from a financial institution.

134. In fact, Johnson was so unsure of Sonrise as a source for funding that he obtained back-up financing on the advice of an independent (non-Sonrise sponsored) attorney. Johnson then sought a commitment from Mr. Ware, a businessman. But Mr. Ware was not provided with a specific dollar amount and Johnson did not seek or receive any documents that would indicate Mr. Ware's ability to make a loan. (*See* Paras. 30-32, *supra*.)

135. The Review Board has established as a working rule of reason that reliance on conversations with Sonrise officials does not provide an applicant with a reasonable assurance of financing. *Marc A. Albert*, 6 F.C.C. Rcd 13, 14 (Review Bd 1991). The evidence here discloses that at the time that JBI filed its application, it did not have reasonable assurance of net liquid assets on hand or sufficient funds from a committed source to construct and operate, a condition precedent to meeting a false financial certification issue. *Scioto Broadcasters Limited Partnership*, 5 F.C.C. Rcd 5158 (Comm'n 1990); *JAM Communications, Inc.*, 4 F.C.C. Rcd 3754 (Comm'n 1989). The Commission has held that an applicant must have its financial ability established at the time it files its application and certifies positively to its financial qualifications, as did JBI. *See Aspen FM, Inc.*, 5 F.C.C. Rcd 3196 (Comm'n 1990), *Shawn Phalen*, 5 F.C.C. Rcd 4669 (Comm'n 1990). Thus, neither the Sonrise speculative assurances nor the undocumented commitment from Mr. Ware qualified JBI financially when it certified. *Northampton Media Associates*, 4 F.C.C. Rcd 5517, 5519 (Comm'n 1989), and therefore, JBI has failed to show by a preponderance of the evidence that in July 1987, it was financially qualified. For that reason, the false financial certification issue is resolved against JBI and JBI is found not qualified for comparative consideration.

136. It is recognized that after Johnson assumed control in September 1989, he obtained a bank letter in October 1989, that mooted a current financial issue. *See Order* FCC 90M-312, released February 20, 1990, and fn. 2, *supra*. But that letter does not relate back to the certification in 1987. Consideration was also given to JBI's agreement that Johnson did not intend to deceive the Commission when he certified. The applicable standard, cited by JBI, is as follows:

> [T]he latter issue (*viz.*, misrepresentation of financial qualifications), inquires as to whether an applicant knew (*or had reason to know*) that it had no genuine commitment to obtain funds for initial construction and operation, but affirmatively certified as to its financial abilities nonetheless.

Rebecca L. Boedker, 5 F.C.C. Rcd 2855, 2858 (Review Bd 1990). (Emphasis added.) *See* JBI's PFC at 57. Johnson, a college professor with radio broadcast experience, was on notice that Sonrise's assurances and puffings were not to be relied upon. The mere absence of a definitive escrowing of funds in a designated bank account which would be controlled by JBI are sufficient circumstances to put a person of Johnson's qualifications on notice that Sonrise was promising more than it could deliver. Certainly, he was sufficiently suspect of Sonrise to seek out back-up financing from Mr. Ware based on non-Root legal advice. But a sophisticated person such as Johnson who had agreed to act as the venture's chief executive had reason to know that Ware knew nothing about how much money would be needed and Johnson had no knowledge of Mr. Ware's liquidity and financial resources that could be made available. *Compare Northampton Media Associates*, *supra* at 5518 where the Commission notes the critical circumstance in that case, that the Cuttings, who were 80% equity owners, read and understood Form 301 and Reid, Johnson's counterpart, made a "thorough review" of the Cuttings' personal resources. The absence of similar circumstances here warrants the conclusion that Mr. Ware's commitment was an accommodation.[26] Therefore, the false financial certification issue set against JBI is resolved against JBI on the issue of an intent to deceive under the *Boedker* "reason to know" standard.

Reporting And Business Form Issues

137. Issues 8 and 9 are interrelated questions. The Commission's rules require that applicants maintain "continuing accuracy and completeness of information furnished in a pending application" and that whenever information is no longer "substantially accurate and complete in all respects," an applicant must amend within 30 days of the event, unless "good cause" is shown for a later amendment. *See* 47 C.F.R. §1.65. This duty on the part of applicants to keep applications current carries over to the duty to disclose the true corporate status of JBI which was in the process of incorporating for two years.

138. Sonrise is recognized as a past purveyor of "get rich" schemes through ownership of new FM allocations obtained through the comparative hearing process or by way of a settlement payoff. In several separate enterprises which were promoted by Sonrise, there were character issues added by Presiding Judges that remained unresolved. *See HDO* at Para. 5 (listing 14 comparative cases having character issues added against Sonrise). Thus, any principals of JBI who were officers, directors or owners of 5% or more of the voting stock were required to disclose all interests in pending applications or which were pending in cases that had been concluded without resolving character issues. (*See* Form 301, Qs. 5.) The evidence discloses that five of JBI's passive investors had interests in such broadcast stations.[27] But because these were non-voting interests, these five partners in JBI were not parties to JBI's application for reporting purposes. *See Attribution Of Ownership Interest*, 97 F.C.C. 2d 997, 1008-09 (1984) (where single person holds majority of voting stock, minority shareholders are not considered to be parties to the application). Thus, there was no violation of §1.65 by JBI with respect to non-reporting of broadcast interests and related character issues involving the five non-voting shareholders of JBI. *See Hampshire County Broadcasting Co., Inc.*, 3 F.C.C. Rcd 6137 (Comm'n 1988) (for reporting violation to be disqualifying there must be a showing of an intent to conceal the information).

139. The motion to delete those issues was filed by Johnson's new counsel on September 21, 1989. (*See* Para. 27, *supra*.) Because of disclosure in its motion that JBI was at that time in fact incorporated, the motion to delete the reporting issues was granted on the non-attribution theory discussed above. *See Memorandum Opinion and Order*, FCC 89M-2535, released October 26, 1989. The Bureau supported deleting the issue it had set in the *HDO* on the representation made in JBI's motion that it was, in fact, a corporation. *Id.* at Para. 3 (Bureau had construed JBI's structure to be a partnership). It is noted that the Presiding Judge deleted the reporting issue under the "compelling circumstances" standard that applies to Judges deleting issues set in designation orders. *Id.* at Para. 4, citing *Ft. Collins Telecasters*, 103 F.C.C. 2d 978, 983-84 (Review Bd 1986). However, corporate papers were not filed in Georgia until September 26, 1989, five days after the motion was filed.

140. JBI asserts that it may claim the status of a corporation without having actually incorporated under state law, citing *Coast TV*, 4 F.C.C. Rcd 1786 (Comm'n 1989).

But that case was limited to recognizing the claim of corporate identity for purposes of claiming integration credit. *Id.* at 1788. The admitted failure to accurately disclose the fact of non-incorporated status is argued to be a misstatement that was of no legal consequence to JBI and there was no intent to deceive. JBI would file an amendment reporting incorporation after September 21, 1989, and so JBI would not be able to conceal the facts. JBI amended its application on October 27, 1989, to report its change in non-voting shareholders after dissolution of the partnership, Capital Broadcast Group. *See Order* FCC 89M-2622, released November 8, 1989. But on December 21, 1989, a motion was filed to reinstate the §1.65 issues. The Presiding Judge also added a misrepresentation issue:

> To determine whether [JBI] made a material misrepresentation to the Commission with respect to its business form.

See Memorandum Opinion and Order, FCC 90M-237, released February 7, 1990.

141. The evidence fails to establish an intent to deceive the Commission on the part of JBI with respect to its business form. *Cf. RKO General, Inc.*, 5 F.C.C. Rcd 638, 639 n. 6 (Comm'n 1990) ("good faith" certification which is merely erroneous will not disqualify an applicant under a misrepresentation charge). Even as filed by Root, the application consistently represented that JBI intended to incorporate. Johnson was misled by Root into believing that incorporation had been effected. Johnson was relying on the expertise of newly retained communications counsel in September 1989 and on the alacrity of local counsel to file incorporation papers in Georgia. There was only a five-day delay between JBI counsel filing the motion on September 21 and the filing of corporate papers on September 26. The omission was unintentional and there is no proof or appearance of improper motive. Therefore, there will be no adverse ruling against JBI for misrepresenting its business form to the Commission. *See Riverside Broadcasting Co., Inc.*, 104 F.C.C. 2d 644, 648 (Comm'n 1986) (intent to deceive is *sine qua non* of a misrepresentation issue).

Southern Radio Services, Inc.

Financial Certification and Qualification

142. Issues were added to determine whether Southern falsely certified its financial qualifications to the Commission and to determine whether Southern is financially qualified to construct and operate for 90 days without revenue (Issues 11 to 13).

143. Southern involves the application of another principal who was interested in Mableton but switched to Roswell, Maurice A. Negrin. The person who certified the financial portion of Form 301, Ms. Anita Johnson, saw the application for the first time when she signed and she relied on Negrin's oral advice for her certification. When she certified, there was no written budget estimate and there was no evidence that Ms. Johnson was privy to informal non-written calculations and estimates that Negrin claimed that he had made. The uncorroborated self-serving evidence relied on by Southern will not suffice. *See Aspen FM, Inc., supra* and *Northampton Media Associates, supra* (discussed under JBI conclusions at Paras 134 to 135, *supra*). In the absence of concrete details shown by credible evidence that Negrin's knowledge was communicated to Ms. Johnson at a time and in a manner that she was able to fully understand and comprehend, broad assurances communicated to her by Negrin carry no weight and Southern is found to have failed to meet its burden of proof. *Susan S. Mulkey*, 3 F.C.C. Rcd 590, 591 (Review Bd 1988), *aff'd*, 4 F.C.C. Rcd 5520, 5523 n. 3 (Comm'n 1989).

144. The burden of proof was assigned to Southern and therefore Southern has the burden of demonstrating that it possesses the qualifications to be a Commission licensee. *Cuban-American, Ltd.*, 5 F.C.C. Rcd 3781, 3785 (Comm'n 1990). *See* also *Midwest Radio-Television, Inc.*, 24 F.C.C. 2d 625, 626 (Comm'n 1970). Negrin was relying on a $350,000 "ballpark" estimate. After certification, Negrin obtained a bank letter dated September 30, 1987. Ms. Johnson had never furnished her financial statement to the bank yet the terms of the letter would require her guaranty. While the letter makes reference to discussions in the previous July, Ms. Johnson had no recollection of a dollar amount being discussed. Such circumstances present no credible evidence to support Southern's proposal, or to establish reasonable assurance of financing at the time of certification by Ms. Johnson.

145. There was no substantial evidence offered to prove that the bank had given Southern any oral reasonable assurance at any meeting in July. Nor is there any evidence that financial statements of shareholder-guarantors or a written estimate of costs were furnished to the bank in connection with the letter it issued. *Since* Southern has the burden of proof and did not either produce the banker as a witness or offer other substantial evidence on the letter's *bona fides*, it is found to be a mere accommodation. *Cf. Albert E. Gary*, 5 F.C.C. Rcd 6235, 6237 (Review Bd 1990). Furthermore, it is concluded that Southern lacked a reasonable assurance of its financial qualifications at the time of Ms. Johnson's certification and it cannot rely on a later bank letter to support the earlier certification. *Opportunity Broadcasting of Shreveport*, 6 F.C.C. Rcd 1499, 1501 (Review Bd 1991). Therefore, Southern is found to be not qualified to be comparatively considered for a grant in this case.

Mazo Radio Co.

Party In Interest And Sham

146. Issues were added to determine whether Mark Taylor is an undisclosed party-in-interest to MRC's application and whether MRC's structure is a sham (Issues 17 and 18). The evidence discloses that MRC has not met its burden of proof on the added issue. Mark Taylor, acting through his son Charles Taylor, Mr. Grien and Mazo, is an undisclosed real party-in-interest and the application, with Mazo as its purported sole integrated principal, is a sham.

147. Mark Taylor had intended to file for Roswell but he was advised against doing so by an attorney. Mazo was a close friend of the Taylor family who had no interest in filing an application until a week before MRC filed. Judith Taylor, Mark's wife, warned Mazo to keep the Taylor's name from appearing in the case and while no reason was given, the rational intent would be to conceal the scheme for a Mazo front. (Jackson Exh. 14 at 2.) But despite that attempt at anonymity, evidence of a Taylor influence abounds. Mark Taylor, through his son Charles,

provided all resources: funding, legal counsel, engineer, antenna site, office space, and an office staff. Thus, Mark Taylor was able to do indirectly what he was advised by counsel not to do directly: file an application for the Roswell allocation through Mazo.

148. Mark Taylor controls Mazo and MRC's proposal indirectly through his son Charles, an 80% equity owner, who brought in another friend, Grien, as a corporate director. Charles Taylor controls Grien. (*See* Findings at Para. 44, *supra*.) The day-to-day business is conducted by Linda Angel, an employee of Mark Taylor, at Mark Taylor's business premises. Charles Taylor advanced $200,000 and there is no note to evidence a debt which requires the conclusion that it was a capital investment for which the Taylors expect a later return in equity. Mazo, who invested less than $500, does not offer convincing evidence that he will serve as anything more than a figurehead until a license is granted. He has no significant broadcast experience and he owns and operates his own business in Savannah with no plan for its continuance, termination or divestment. *See Julia S. Zozaya*, 5 F.C.C. Rcd 6607 (Comm'n 1990). Charles Taylor prepared, or had prepared, a shareholders' agreement that was given to Mazo for signature, not for any review or comment. And even though the agreement precluded him from engaging in the business, Charles Taylor admitted that he had engaged in three-way conference calls with communications counsel. He participated in the decision to drop Mark Taylor as a director and he selected his friend Grien as a replacement.

149. But the strongest evidence of the Taylor's control and the intent to operate a sham is found in JBI's structure: Charles Taylor is a director and as such he has the right (and duty as a fudiciary) to act on all JBI business. And if Mazo does not perform favorably under §1.6 of the Shareholders Agreement, he is subject to a mandatory buy-out by the "remaining shareholder", i.e., Charles Taylor. In short, Mazo does not have a "no-cut contract." In recognizing that Mazo is a *tyro* in the broadcasting industry, his performance requirement goal of profitable operations by the station's second anniversary is unreasonable and virtually assures that voting control will soon revert to the Taylors. (*See* Findings at Paras. 47-48, *supra*.) It has been held that limited partners who have the power to take the station from a general partner, without consent, have more than just a passive interest. *Doylan Forney*, 3 F.C.C. Rcd 6330 (Review Bd 1988), *aff'd*, 5 F.C.C. Rcd 5423, 5424 (Comm'n 1990). While the Commission's attribution policy considers as non-attributable the convertible interests of passive owners who have no control over the contingency, the condition requiring a second anniversary operating profit of a person without any business track record is tantamount to control of a reversionary interest. *Cf. Attribution Of Ownership Interests*, 97 F.C.C. 2d 1021-22 (1984).

150. A real party-in-interest is one who is in a position to actually or potentially control the operation of a broadcast facility. *San Joaquin Television Investment Corp.*, 2 F.C.C. Rcd 7004, 7008 (Comm'n 1987). While financial investment does not establish absolute responsibility for a non-voting shareholder, the Commission has found such evidence to be probative of a real party-in-interest finding when there is no obligation for repayment. *See KIST Corp.*, 102 F.C.C. 2d 288, 292 (Comm'n 1985). And where the applicant's structure reflects control in persons who are purported to be mere investors, the application will be deemed a sham. *Cf. Pacific Television, Ltd.*, 2 F.C.C. Rcd 1101 (Review Bd 1987). *See also Perry Television, Inc.*, 5 F.C.C. Rcd 1667 (Review Bd 1990) (persons controlling the drafting of structural documents that contain terms that are favorable to the drafters are *indicia* of control). In that case, the Board found real parties-in-interest on the part of non-principals who were exercising control where the purported integrated principal was brought in to sign on the day of filing, a scenario quite similar to Mazo's participation. *Id. Compare Rayne Broadcasting, Company, Inc.*, 5 F.C.C. Rcd 3350 (Review Bd 1990). Thus, the "totality of record evidence" negates any claim that MRC is a *bona fide* business arrangement. Of particular note are the rapid fashion in which Mazo was enlisted after Mark Taylor found himself in a quandary with Mableton, and the continuous control over all essential aspects of prosecuting the application by the Taylors and through the Taylors, as well as the decisions on structure that remained with the Taylors. *Cf. Carta Corporation*, 5 F.C.C. Rcd 3696, 3702 (Review Bd 1990).

Lowell Maze Jackson

Ex Parte And Abuse Of Process Issues

151. Issues were added to determine whether an illegal *ex parte* communication was made to the Presiding Judge on behalf of Jackson and whether Jackson had attempted to solicit *ex parte* letters and thereby abuse the Commission's hearing process (Issues 14, 15, 16). The evidence discloses that Jackson had solicited letters from community leaders that would endorse his application. Certainly, such a letter campaign, if found to have been designed or intended to result in direct communications to the Presiding Judge, would be a scheme and device to violate the *ex parte* rule. 47 C.F.R. §1.1208 (restricted proceedings).

152. The Commission's rules specifically prohibit any person from soliciting or encouraging others to make any representation which she or he is prohibited from making. 47 C.F.R. §1.1210. These rules prohibit communications that relate to the merits or to the outcome of a proceeding which are made to a Commission decision-maker, unless simultaneously communicated to all parties to the proceeding. 47 C.F.R. §1.1202(a)(b). But the evidence here shows that Jackson intended to have all letters of endorsement returned to him and that he later, after consulting with communications counsel, would present them to the presiding trial judge on notice to all parties. Obviously, his logistical plan failed because State Senator Newbill, with her busy office routine, overlooked Jackson's instructions on handling the correspondence. Her letter was sent directly to the Presiding Judge which stated, without notice to the other parties, that she supported Jackson's application for the Roswell station. (*See* Para. 55, *supra*.)

153. The standard applied by the Commission for setting an *ex parte* issue is whether the event would disqualify an applicant. *See Valley Broadcasters, Inc.*, 5 F.C.C. Rcd 2785, 2789 (Comm'n 1989). The Commission has focused on "egregious" conduct which is "repeated" as the standard for *ex parte* conduct that will disqualify an applicant. *Id.* In an earlier case, *Desert Empire Television Corp.*, 88 F.C.C. 2d 1413, 1416-18 (Comm'n 1982), where a licensee engaged in repeated *ex parte* violations, some of which had occurred after the applicant was put on actual notice of unlawfulness, the Commission assessed a money forfeiture, but the licensee was not disqualified from re-

ceiving a grant. While there may be a basis to require less intrusive conduct of an applicant, the Commission has not altered the twin tests of egregious - repeated conduct. *See Valley Broadcasters, Inc., supra. Compare Stearns County Broadcasting Co., Inc.*, 104 F.C.C. 2d 688, 697-99 (Review Bd 1986), *aff'd*, 3 F.C.C. Rcd 2987 (1988) (a repeated offender who had orchestrated an *ex parte* campaign only had its application dismissed, without prejudice, and was not found to be disqualified).

154. Here, in Jackson's case, there was only one letter that slipped through his system. His testimony is accepted that he did not know that such communications would be illegal and that he was unfamiliar with the *ex parte* rule at a time when he was not represented by counsel. The evidence establishes that Jackson did not solicit an *ex parte* contact, never intended one, and specifically instructed the recipients not to contact the Judge. His plan was to assemble all letters and than present them to his communications counsel. But at the time he solicited the letters he had no counsel, and he never checked out with a communications counsel the propriety or the futility of his efforts until after the fact. Jackson appeared sufficiently contrite on the witness stand to conclude that he is not likely to violate the *ex parte* rule at anytime in the future. Thus, as in *Valley Broadcasters*, "the severe sanction of [Jackson's] disqualification would clearly be inappropriate" here. It is concluded that Jackson should remain basically qualified and eligible for comparative consideration below.

155. There was a related issue added with respect to whether Jackson was attempting to intimidate or improperly influence the Presiding Judge by compiling multiple letters from influential people and offering them in evidence after notice to other parties, including producing copies in advance of any offer into evidence. *See Memorandum Opinion and Order*, FCC 90M-215, *supra* at Para. 8. The preponderance of the evidence establishes that Jackson had initiated his efforts without benefit of counsel. Therefore, at such time as counsel would have been presented with these letters, counsel would be expected to have advised Jackson that they were not relevant and that they would not be offered into evidence. *See D. C. Code of Professional Responsibility (1986)*, DR 7-106(c)(1) (a lawyer shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case). Jackson's counsel suggested that it might have been appropriate to offer them into evidence on notice to the other parties, in which event the proper remedy would be for the Judge to reject or strike the evidence. (*See* Jackson's PFC at 65.) But that suggestion is rejected as an alternative. Certainly, the potential for intimidation or undue influence, or at least the appearance of attempting to accomplish either adverse effect, are self-evident. In principle, the perceptible impact on the decision-maker would be in proportion to the perceived influence of the letter writer. Not that it would work in Commission adjudication. The Commission's procedures should not be burdened or cheapened with any such practice which could, under the right set of facts, evolve into an actionable abuse of process. And if an applicant submitting such letters was found deserving of a grant, what would the other applicants and the interested public think?

Comparative Proposals

156. For reasons stated above, JBI, MRC and Southern are not basically qualified and therefore their proposals will not be comparatively weighed. GPTC does not propose to integrate so GPTC has no proposal to compare. That leaves Jackson, Miles, Rounsaville and Holley for final comparative consideration. There are no basic qualifying issues added against these applicants. But where substantial questions have been raised about an integration proposal, its *bona fides* will be considered under the standard comparative issue. *See, e.g., N.E.O. Broadcasting Company*, 103 F.C.C. 2d 1031, 1035 (Review Bd 1986). Also, there are separate issues of comparative coverage and diversification to consider and non-specified considerations of lack of candor before the Presiding Judge.

Comparative Coverage

157. The highest comparative coverage preference generally is awarded to the applicant proposing to provide a first or second service. *Christian Broadcasting of the Midlands, Inc.*, 99 F.C.C. 2d 578, 582-83 (Review Bd 1984). But in this case, none of the applicants will provide service to an underserved area. And when areas and populations are well-served, only a slight preference will be awarded to applicants proposing even substantially greater overall coverage. *See Simon Geller*, 90 F.C.C. 2d 268-269, 276 (Comm'n 1982) (slight preference awarded for coverage superiority of four times more area and 315,000 persons). An applicant would receive the lesser qualitative credit of "very slight preference" for a coverage difference of 27%. *See Barton Broadcasting Co.*, 104 F.C.C. 2d 785, 791 (Review Bd 1986). But where the differences are insignificant, no preference is awarded. *Susan S. Mulkey*, 4 F.C.C. Rcd 5520, 5521 (Comm'n 1989) (coverage difference of 2% for 36,200 persons).

158. Under the applicable standards, Holley's proposal to serve 870,700 people would receive a slight preference over the proposals of GPTC (421,300), Jackson (513,200), and a very slight preference over Miles (648,500) and Rounsaville (625,200).[28] Miles and Rounsaville receive only very slight preferences over GPTC and Jackson.

159. But an objection has been raised to Holley's comparative coverage on grounds that his proposal violates existing local zoning requirements. It has been established that for purposes of the basic qualifying condition of reasonable assurance of a proposed site's availability, the Commission will presume that zoning approval will be forthcoming "absent a reasonable showing that the applicant will not be able to obtain approval of his plans from local authorities." *Lester H. Allen*, 20 F.C.C. 2d 478, 481 (Review Bd 1969). There are existing questions about obtaining zoning clearances here which, while not sufficient to add a cite certification issue, do preclude Holley from receiving a qualitative comparative coverage credit for a failure of proof. *See Seattle Public Schools*, 4 F.C.C. Rcd 625, 643-44 (Review Bd 1989). Holley has failed to meet his burden of proof that he can effect his proposed coverage. *Cuban-American, Ltd., supra*. Therefore, Holley receives no credit for comparative coverage.

Diversification

160. Jackson and Rounsaville receive no diversification demerit. (*See* findings at Paras. 62 and 67, *supra*.) Holley has taken inconsistent positions with respect to his Mableton and Roswell applications. (*See* Findings at

Paras. 66, 115-116, 118, *supra*.) But Holley has met the technical requirements for making a diversification pledge in Roswell and that pledge will be accepted. Therefore, Holley receives no diversification demerit. However, he has failed to show plans for leaving two ongoing radio stations that are his present business interests and that failure will detract from awarding any integration credit to Holley. *See* Paras. 113, 121 *supra* and 171, *infra*.

161. GPTC owns and operates eight FM stations and nine TV stations in Georgia. GPTC receives a substantial diversification demerit. (*See* Findings at Paras. 60-61, *supra*.) Jackson, Rounsaville, and Holley tie for diversification credit.

Best Practicable Service To the Public

Lowell Maze Jackson

162. Mr. Jackson, a white male, proposes to integrate full-time into the station's management and operations as a sole proprietor. Jackson represents that he will leave his present position as marketing consultant if he receives the grant. There is no basis in the record to doubt his representation. He has resided for most of his life in the Atlanta area where he attended school. Jackson receives credit for having resided for a substantial period of time in his proposed service area (not in Roswell). But he receives no credit for civic activities because he had such a poor recollection of dates of his membership in the Roswell Lions Club. He has failed to show how his activities as church deacon effected Roswell, and most activities commenced at or about the time of his application. But Jackson will receive a very slight credit for his broadcast experience and for his proposed auxiliary power. (*See* Findings at Paras. 70-76, *supra*.)

Ivan M. Miles

163. Mr. Miles, a white male, proposes to integrate full-time into the station's management and operations as sole proprietor. Miles is 77 years of age. He has resided in the proposed service area for his entire life and receives credit of local residence for 55 years.

164. Miles retired in 1988 from his profession as broadcast engineer. Since that time, he has occupied his time with leisure travel. There now are no ongoing business commitments that require winding up or transfer in order for Miles to participate full-time in the management and operation of a Roswell station.

165. Miles has placed no limitations on the length of time that he will devote to managing and operating the station. He will formulate and implement all policy, supervise the staff, manage finances, and ensure compliance with FCC rules and policies. (Miles Exh. 1.) Miles also will perform hands-on engineering services (his *forte*') and he will even devote time to such detail as entering financial data into the station's computer. This evidence shows a commitment to perform all tasks needed to insure adequate management and operation. As indicated above, there is no evidence of any conflicting outside duty or interest. But even if Miles should become engaged part-time in a consulting project, when he receives a construction permit for Roswell he would terminate such employment. Under the circumstances here of a retiree who has no present business to divest, Miles has met the burden of proof to show that he is committed to carrying out his proposal.

166. Miles has substantial broadcast experience as an engineer with Station WAOK(AM) in Atlanta. He was employed at the station through three changes of ownership from 1959 to 1984 when he retired. In 1977, he became Director of Engineering for the station's owner, Broadcast Entertainment Network, Inc., ("BEN") which owned 5 FM stations and four other AM stations. And for a period of 21 years prior to his employment at WAOK, he was employed as an engineer at Station WGST. In 1984, Miles became a full-time consulting engineer and he was retained by BEN as a consultant. He consulted full-time from 1984 to 1986, and from 1986 to 1988, he consulted on a part-time basis.

167. Miles is a member of the board of trustees of a church in Atlanta, to which he has belonged for 23 years. Miles testified that the church's "Shephard Center" provides services to Roswell residents. *Cf. Newton Television, Limited*, 3 F.C.C. Rcd 553, 556 (Review Bd 1988) (civic activities ancillary to a church affiliation can be credited). Miles' long-term association as leader in an inner-city church in Atlanta, which is located and provides civic oriented support within Miles' proposed service area, provides the Commission with a creditable "barometer" of Miles' knowledge and interest in contemporary needs, problems and interests of his proposed service area. *See Policy Statement*, *supra* at 396; *Radio Jonesboro, Inc.*, 96 F.C.C. 2d 1106, 1109 (Review Bd 1984), *aff'd* 100 F.C.C. 2d 941 (Comm'n 1985). For residents of Roswell attend churches that are part of the Shepherd Center and the relevant civic activities, although directed towards the inner-city of Atlanta rather than the regions of suburban Roswell, represent the civic interests of residents of Roswell. Thus, Miles is entitled to a moderate civic credit based upon his long-term residency in the service area coupled with a substantial showing of community interest through his church involvement in service area projects. *See Ronald Sorenson*, 6 F.C.C. Rcd 1952 (1991), (Comm'n considers civic activities as a part of an applicant's local residence). *See also Colonial Communications, Inc.*, Comm'n *Slip Op.* 91-127, released May 2, 1991, at Paras. 7 to 11 (longer continuous residency and greater involvement in civic activities). *Cf. West Michigan Broadcasting Company*, *supra*, 735 F.2d at 608 (moderate enhancement approved).

Robert W. Rounsaville

168. Mr. Rounsaville, a white male, proposes to integrate full-time into the station's management and operations as sole proprietor. Since 1972, he has resided in his proposed service area, but business interests kept him travelling extensively. He lived in Roswell in the mid-1960s, dates that are too remote in time to qualify for a local residence credit. He will only move to Roswell if he receives the grant. Rounsaville has lesser contacts with the Roswell community than Jackson, Miles and Holley, has no record of civic involvement, and his superior past broadcast experience does not off-set his comparative demerit for his lack of local residency and related lack of civic involvement.

169. The evidence also raises substantial questions about the applicant's ability to carry out his integration proposal. Rounsaville has completed an autobiographical book about himself, " *Radio Man*, and he will be spending a considerable amount of time on-the-road marketing the book. Rounsaville also has plans to develop a forty eight acre tract of land in Florida. And Rounsaville is 75

years of age. (*See* Findings at Paras. 100- 102, *supra*.) He has not shown how he will spend substantial amounts of time marketing a book, developing real estate, engage in radio station brokerage, and also manage a radio station. Since he commits to full-time integration, Rounsaville has the burden to prove that he is entitled to comparative credit. *See Policy Statement*, *supra* and *Julia S. Zozaya*, 5 F.C.C. Rcd 6607 (Comm'n 1990). The Review Board has held:

> And where an applicant has a current business interest which could conflict with a principal's pledge to devote his or her full-time to management of the proposed station, the applicant must make a specially convincing showing as to how those interests are to be simultaneously accommodated, or integration will be denied. [Cases omitted]

Victorson Group, Inc., 6 F.C.C. Rcd 1697, Review Bd *Slip Op.* FCC 91R-26, March 28, 1991 at Para. 10. Rounsaville has made no such showing as to how he would meet these interests and therefore his intergration proposal will not be credited.

Eathel Holley

170. Mr. Holley, a white male, proposes to integrate full-time into the station's management and operations as sole proprietor. Holley has established 28 years of local residency in the service area, a period that surpasses Jackson, but not Miles. None of his civic activities were shown to take place in Roswell proper. Pictures assembled for an art exhibit included some of Roswell but Holley had no responsibility for assembling the works or in organizing the exhibits. (*See* Findings at Para. 119, *supra*.) The Sunday school group to which he belongs provides shelter for the homeless and housing for the needy, and while none of those activities took place in Roswell, there are recognized interests of Roswell residents in assisting the inner-city of the Atlanta service area that will be credited. But Holley has not shown how his participation was more than mere membership which is a comparative passive local association. *Cf. Ronald Sorenson*, *supra*. Holley has considerable broadcast experience through his long-term broadcast ownership for which he receives a slight comparative preference over Jackson and a very slight preference over Miles.

171. But Holley has effectively dissembled in his testimony about conflicting proposals for Mableton and Roswell. First, Holley testified that he proposed to divest himself only from management but not from his ownership of ongoing AM stations in order to spend full-time at Mableton. Without a showing of specific evidence as to how that would be accomplished, it is found that Holley had no divestment intent for his Mableton proposal. But of greater significance is the inconsistent positions taken by Holley with respect to his commitments to the Mableton and Roswell proposals. Holley intended to apply for Roswell when he applied for Mableton. He had Roswell as his goal when he applied for Mableton and therefore had no intention to work full-time in a Mableton station. Yet he had no plan for the divestment of the AM stations at the time that he formed his intention to seek the Roswell allocation. He was thinking only of divesting himself from management from July 10 to July 24, 1987. And from his testimony it cannot be determined whether he had no budget for Mableton or whether he used the Mableton budget for Roswell.

172. Holley also was shown to be evasive in his testimony. He needed to be directed through deposition statements to the two reasons for dismissing his Mableton application, and when shown a budget document his answer moved from "possibly" to "probably" and while testifying at one place to having had no site for Mableton, he later testified, to the contrary, that he had spent considerable time finding and securing a site for Mableton. (*See* Findings at Para. 115, *supra*.) His testimony at least established that there was serious doubt that a budget had been prepared for Mableton. Such misconduct in another Commission matter warrants a sanction here. *See Gainesville Media, Inc.*, 72 F.C.C. 2d 795, 796 (Comm'n 1979). An appropriate sanction would be to award no qualitative credit to Holley.

173. In the final analysis, the burden is on an applicant to establish by a preponderance of the evidence both that it is qualified to be a licensee and that the public interest will be served by a grant of its application. *See Cuban-American, Ltd.*, *supra*. The Review Board has noted specifically the scope of the duty to be candid in presenting matters to a hearing official:

> Our own lack of candor offense - - - arises from the special duty imposed upon FCC licensees and applicants to go beyond merely avoiding an affirmative misrepresentation, but to be fully forthcoming as to all facts and information relevant to a matter before the FCC - - -.

Silver Star Communications-Albany, Inc., *supra* at 6349. Mr. Holley has failed to be fully forthcoming on important issues of fact regarding his dual interests in Mableton and Roswell at a time when he had an application pending for Mableton after he had formed an intent to pursue Roswell. And he failed to convince the Presiding Judge with substantial credible evidence that he had independently prepared a Roswell budget and that he did not use the same "budget" for Mableton and Roswell. It would not be in the public interest to award the grant to an applicant who has failed to present credible evidence.

Summary Conclusions

174. GPTC offers no integration proposal for comparison and, therefore, could only be declared a winner if no other applicant qualified for integration into the station's management and operations. JBI, MRC and Southern are not qualified. Rounsaville has failed to prove that he will carry out his integration proposal and he has no record of local civic involvement. Holley also has failed to prove that he is prepared to leave his AM businesses for full integration at Roswell. But since he has civic experience, he will be contingently compared with Jackson and Miles.

175. Miles has longer residency in the service area and more creditable civic involvement than Jackson and Holley. *See Vacationland Broadcasting Co., Inc.*, 97 F.C.C. 2d 485 (Review Bd 1984) (advantage credited to applicant with longer term of local residence). Jackson will not be credited with civic membership because he was not credible on significant dates, and Miles will receive more credit than Jackson or Holley for his continuous residency for 55 years in the 1 mV/m contour coupled with his leader-

ship position as trustee of a church to which he belonged for 23 years. *See Ronald Sorenson* and *Colonial Communications, Inc., supra.*

176. Miles and Holley also have more broadcast experience than Jackson. Holley receives no credit for comparative coverage for a failure of proof on how he could overcome zoning restrictions to effect his coverage. Miles would serve 135,000 additional persons and receives a very slight preference over Jackson and a moderate preference over Holley by the latter's default. Neither Miles, Jackson nor Holley qualifies for a racial preference or a gender preference. Each of the three parties proposes auxiliary power.

177. Miles is awarded the higher number of qualitative credits for his superior length of residency in the service area coupled with his superior related civic involvement. *Ronald Sorenson, supra.* Therefore, Miles is awarded the construction permit for the Roswell FM station.

Testimonial Candor

178. Alternatively, Jackson and Holley should be evaluated for possible lack of candor in testimony before the Presiding Judge. *See Old Time Religion Hour, Inc.*, 95 F.C.C. 2d 713, 719 (Review Bd 1983) (an applicant may be disqualified on the basis of a principal's candorless testimony in open court). *Cf. RKO General, Inc.* v. *F.C.C.*, 670 F.2d 215, 234 (D.C. Cir. 1981). Jackson's testimony was misleading in seeking to establish membership in a local civic organization in 1986 when a membership card showed him to be a member in 1987 and Jackson could produce no proof of 1986 membership. Since Jackson was clearly interested in establishing a credit-worthy local civic involvement, he had a motive to mislead the fact-finder into believing that membership occurred in 1986 rather than in 1987, the year in which he filed his application. (*See* Para. 73, *supra.*) If Jackson were a final contender he would be disqualified for his lack of candor.

179. For his part, Holley's testimony was not convincing about facts that Holley should have been capable of relating clearly and concisely. Specifically, the matter of whether he had prepared a budget for Mableton and/or whether Mableton's budget was later used for Roswell. There also are several credibility gaps in Holley's Mableton application concerning an intention formulated to divest from management of the AM station, but not ownership, and the inability to explain inconsistent simultaneously held intentions to integrate into Mableton and Roswell. But while Holley was not credible and not a trustworthy recounter of events, the inference could equally be made that he was confused which negates that he intended to mislead. Holley receives the benefit of the doubt. Therefore, no adverse candor findings are found justified with respect to Holley's testimony.

ORDER

Based on the foregoing, IT IS ORDERED that unless an appeal from this Decision is taken by a party, or unless the Commission reviews this Decision on its own motion,[29] the applications of Georgia Public Telecommunications Commission (File BPED-870727MA); Lowell Maze Jackson (File No. BPH-870727MD); Johnson Broadcasting, Inc. (File No. BPH-870727MF); Paul Uhry Mazo d/b/a Mazo Radio Co. (File No. BPH-870727MJ); Robert W. Rounsaville (File No. BPH-870727MK); Southern Radio Services, Inc. (File No. BPH-870727ML); and Eathel Holley (File No. BPH-870727MQ) ARE DENIED.

IT IS FURTHER ORDERED that the application of Ivan M. Miles (File No. BPH-870727ME) for authority to construct a new FM Station on Channel 298A at Roswell, Georgia IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] There were initially eleven parties. George S. Flinn, Jr. was dismissed early in the case for failure to prosecute. *Order*, FCC 89M-2486, released October 18, 1989. Roswell Broadcast Communications, Ltd. was dismissed for failing to file a responsive pleading to a motion to dismiss after Phase I was tried. *See Memorandum Opinion and Order*, FCC 90M-2167, released July 20, 1990.

[2] A current financial issue had also been added. But that issue was later resolved in a bench ruling in favor of JBI. *See Order* FCC 90M-375, released February 26, 1990, at fn. 3 and *Prehearing Conference* February 22, 1990, Tr. 89-91. *See also Order* FCC 90M-312, released February 20, 1990 (JBI now relies on bank letter dated October 3, 1989).

[3] An issue to determine whether Mazo Radio Co. had misrepresented facts to the Commission and was lacking in candor was subsequently deleted by the Presiding Judge. *See Order* FCC 90M-376, released February 26, 1990.

[4] There also were interlocutory appeals on evidentiary privilege rulings. *See Georgia Public Communications Commission*, 5 F.C.C. Rcd 2596 (Review Bd 1990) (affirming Trial Judge's ruling requiring disclosure of JBI correspondence), *aff'd* 5 F.C.C. Rcd 4560 (Comm'n 1990).

[5] Because of JBI's post "B" date incorporation, JBI receives no credit for Mary Ector's position as corporate secretary.

[6] This exhibit is a copy of a document entitled "Certificate Of General Partnership And Assumed Name" signed by Eugene B. White, the then President of Sonrise.

[7] Root later was disbarred from practice in the District of Columbia, the State of Ohio and before the FCC. *See In re Thomas L. Root, Esquire*, FCC 90-240 (June 28, 1990).

[8] These individuals were: Robert J. Edenfield and Claude Hattaway (Georgetown, TX); Doris W. Gramling and R.J. Patel (Bell Chasse, LA); and William M. Larkin (Raleigh, NC).

[9] An applicant must maintain substantially accurate and complete information in all significant respects and an amendment to report new events must be filed within 30 days of the occurrence. 47 C.F.R. §1.65(b).

[10] Johnson's testimony with respect to two other persons contacted, Eldridge McMillan ("McMillan") and Lamond Godwin ("Godwin") was stricken. Johnson knew nothing about McMillan's financial ability and no amounts of money were discussed. Johnson only spoke with Godwin once at a fortuitous meeting on an airplane. (*See* JBI Exh. 8 at 6-7; Johnson, Tr. 2313-2324.)

[11] There are related questions that remain unanswered due to Southern's failure to call Rollins as a witness. Lowell Maze Jackson sought and obtained a subpoena duces tecum at the discovery stages which resulted in a financial statement for Ms. Johnson that was dated July 13, 1989. Ms. Johnson was earning $22,000 in salary and showed assets of $65,000 (securities $15M and life insurance $50M). She owed $15,000 in car payments. She was also co- signer on a $20,000 note for a loan to cover prosecution expenses. There is little support in these documents for considering Ms. Johnson a viable guarantor for a $350,000 loan that would be relied on by a bank. The financial statement was completed on a bank form and was executed 2 years after her certification of Form 301.

[12] Charles Taylor could not state which percentage of his contributions constituted an equity investment (Tr. 3650). It appears that it is in his discretion to determine how much of his contributions are to be treated as equity and how much would be treated as a loan (Tr. 3653).

[13] Mr. Shainis also represented the Taylor family's low power television applications. (Tr. 3398-99.) Mark Taylor recruited members of his family to apply for LPTV licenses after he found tower sites and obtained engineering. *Id.* He sent the names of family members to Mr. Shainis who filed applications for them. (M. Taylor, Tr. 3398.)

[14] The persons to whom Jackson wrote letters were: Pug Mabry, Mayor of Roswell; Larry Gross, President of Roswell Lions Club; Larry Hardiman, President of the Kiwanis Club; Pam Humphries, Director of the Roswell Historic Society; Judge Richard Winegarten; Judge Joel Thwaites; Lorris North, President of the Roswell Fine Arts Alliance; Senator San Nunn; Senator Wyche Fowler; State Senator Sallie Newbill; State Rep. Tom Wilder; County Comm. Emmett Burton; County Comm. Philip Secreist; County Comm. Thea Powell; Cong. Ben Jones; Cong. Buddy Darden; Gov. Joe Frank Harris; and County Comm. Michael Lomax. (Jackson Exh. 9 at 1.)

[15] A letter dated September 24, 1989, was sent by the office of United States Senator Sam Nunn to Mr. Stevenson S. Kaminer, Director of the Commission's Office of Congressional Liaison. But that letter was not responsive to Jackson's solicitation for support. That letter was a standard inquiry by a member of Congress to a regulatory agency for a status report on a matter effecting a constituent. In that there was nothing improper. *See Memorandum Opinion and Order*, FCC 90M-215, *supra* at Paras. 2-3.

[16] The areas are all served by: WZGC(FM), Atlanta, Georgia; WQXI-FM, Smyrna, Georgia; WPCH(FM), Atlanta, Georgia; WEOA(FM), Atlanta, Georgia; WFOX(FM), Gainesville, Georgia; WSB-FM, Atlanta, Georgia; WAPW(FM), Atlanta, Georgia; WKHX-FM, Marietta, Georgia; WVEE(FM), Atlanta, Georgia; WSB(AM), Atlanta, Georgia, each constituting an existing aural service. (*See* Table IV of Joint Engineering Exhibit 1.)

[17] Proferred evidence on programming has been excluded by the Presiding Judge on grounds of relevancy. (Georgia Public Exhs. 1-6; Tr. 75-82, 121-28.) *See Memorandum Opinion and Order*, FCC 89M-2742, released December 7, 1989.

[18] The day-to-day operation of Georgia State's telecommunications facilities is conducted by executive officials of Georgia State: Richard E. Ottinger, Executive Director; Frank D. Bugg, Jr., Deputy Director; Phil Goodman, Director of Radio Division. (Georgia Public Exh. 1 at 3-4.) Mr. Goodman would be supervised by Mr. Ottinger and Mr. Bugg. (*Id.* at 5.) Neither Mr. Ottinger nor Mr. Bugg are Commissioners.

[19] Miles was once a principal in an application filed for a new station in Ohio but the application was never accepted due to a technical error.

[20] His duties and responsibilities as general manager are to include: overall management of station operation and personnel, including supervisory staff; formation and implementation of personnel policies; formation and implementation of EEO, including policy dissemination, recruitment and training; financial management; and compliance with FCC rules and regulations. (Miles Exh. 1 at 1.)

[21] Negrin testified that he had a general recollection of a filing having been made with the Commission before the Roswell application was filed on July 27, 1987. But no documentation was offered to establish a pre-Roswell amendment in Mableton. The transcript reflects counsel for Mazo verbalizing a reference to an amendment on October 8, 1987. (Negrin, Tr. 801.) There was no dispute at the hearing by Southern's counsel (or any other counsel) that Mr. Riehl's reference to October 8, 1987, as not being reflected in the Mableton file. Therefore, that date is accepted as the date of the amendment.

[22] It is noted, and Southern points out in its PFC at 7, that Southern's Form 301 disclosed the fact that the applicant was not yet formally incorporated but would do so before the "B" cut-off. From this disclosure it appears that Southern's proposal was not formulated when it filed and Negrin wanted to keep his options open for a switch from Mableton to Roswell.

[23] The date of the trade journal article would have relevance. The earlier the date of the article the less credible would be Holley's assertion that he was applying for Mableton when he happened to learn of Roswell in a trade journal. Holley filed for Mableton on July 10, 1987, and he filed for Roswell on July 27, 1987, about two weeks later.

[24] *See* fn. 4, *supra*.

[25] JBI argues that since the Commission ruled that there was no community of interest between JBI and Sonrise, any privilege was waived by Johnson's sending a copy of the document to Savage and, therefore, the control linkage was broken by the Commission's ruling on a discovery issue. (*See* JBI's RPFC at 6 n. 3.) But the Commission's holding on discovery (90-247) does not neutralize JBI's admission by asserting the privilege when the document was directed to Savage. It shows a frame of mind on Johnson's part that Sonrise is still part of the venture. JBI's Reply findings and conclusions take more time and effort to critique Miles' PFC then in addressing the evidentiary facts which show control in Sonrise which needed to be addressed with testimony of Sonrise principals and Sonrise's sponsored attorney (Root) and engineering consultant (Sachs Freeman). *See Washoe Shoshone Broadcasting*, 3 F.C.C. Rcd 3948, 3953 (Review Bd 1988) (failure to produce relevant testimony requires adverse inference to be drawn).

[26] In order to meet its burden of proof, JBI should have produced Mr. Ware. Based on the failure to produce him as a witness on an issue for which the burden of proof was assigned to JBI, the inference arises that Mr. Ware's testimony would have been adverse to JBI. *See Washoe Shoshone Broadcasting*, 3 F.C.C. Rcd 3948, 3953 (Review Bd 1988).

[27] These five persons are identified in fn. 8, *supra*.

[28] JBI (642,700), MRC (603,100) and Southern (489,800) are not comparatively considered because they have been found to be basically unqualified. If they were compared, Holley would receive a slight preference over Southern and very slight preferences over JBI and MRC.

[29] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CICI, INC. D/B/A IDB INTERNATIONAL — File No. I-T-C-91-020

Application for authority to acquire and operate facilities for provision of INTELSAT multipurpose international service.

IDB COMMUNICATIONS CORP. — File No. CSG-91-005-ML

Application for authority to modify its earth station facilities at Staten Island, New York for provision of INTELSAT multipurpose services.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 13, 1991; Released: May 20, 1991

By the Chief, International Facilities Division:

1. The captioned applications, filed by CICI, Inc. d/b/a IDB International (IDB International) and IDB Communications Corporation (IDB-C), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, for IDB International to acquire and operate INTELSAT satellite facilities for switched services to international points. Authority is also requested, pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, for IDB-C to modify its earth station at Staten Island, New York for the provision of multipurpose services via INTELSAT Atlantic Ocean Region (AOR) satellites. The applications were placed on public notice on October 24, 1990. No comments were received.

2. IDB-C requests authority to modify its 15.2-meter C-band Revised Standard A antenna authorized under File No. CSG-88-010-P/L at Staten Island, New York to add emmissions necessary to provide intermediate data rate (IDR) services for the provision of international public switched digital voice, record, and data communications via INTELSAT (AOR) satellites. The emissions are: 76K8G7W, 154KG7W, 307KG7W, 614KG7W, and 1M72G7E.

3. In its Report and Order in the Earth Station Ownership Proceeding, CC Docket No. 82-540, the Commission established a more open and flexible earth station policy which allowed entities other than the Earth Station Ownership Committee (ESOC) to own and operate international earth stations that access the INTELSAT system. The Order permitted the joint carrier owners of ESOC earth stations to decide among themselves the future of ESOC.[1] The Commission also concluded that when reviewing applications for these international earth stations, it would distinguish between earth stations dedicated to providing IBS and/or television services and multipurpose stations. IBS and/or television earth stations, the Commission found, do not have the same potential for revenue diversion and significant impact on system efficiency as multipurpose earth stations. Consequently, the Commission concluded that it would consider only the minimal legal, financial and technical qualifications of the applicant as required by Sections 308 and 319 of the Communications Act of 1934, as amended, when reviewing applications for IBS and/or television earth stations. Absent special problems, the Commission stated that it would treat these applications as routine and process them expeditiously.

4. With respect to multipurpose stations, the Commission stated that it would continue close scrutiny of applications for construction and operation of these facilities since they tend to raise more complex economic, technical and operational issues that may affect the variety, quality and price of service offered to users. In determining whether the grant of an application for a multipurpose earth station will serve the public interest, the Commission indicated it would conduct an analysis by balancing the possible benefits (*e.g.*, shorter terrestrial hauls, increased user options, lower charges to users, and increased customer base for INTELSAT services) against the possible detriments (*e.g.*, reduced technical efficiency, harmful revenue diversion, service deterioration and higher charges to users) which a particular application may present.[2] However, with the dissolution of ESOC earth station ownership arrangements and the transition to a competitive environment, the issue of harmful revenue diversion from existing ESOC earth stations is no longer a concern.

5. IDB International requests authority to provide international switched services between the U.S. and international points, including the U.S.S.R. and Guyana. We will authorize service to the two points specifically requested.[3] Upon consideration of the applications, we conclude that authorization of most of the requested services and facilities will serve the public interest. IDB-C's legal, technical and financial qualifications to construct and operate the proposed international earth station are well-established. The proposed earth station shall comply with INTELSAT performance criteria for Revised Standard A earth stations. IDB-C has also completed the necessary frequency coordination. We also conclude that addition of multipurpose capacity at IDB-C's Staten Island, New York earth station will not adversely affect INTELSAT but will add additional service via the AOR satellites.

6. IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched services to the U.S.S.R. and Guyana by IDB International.

7. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-020 and CGS-91-005-ML ARE GRANTED IN PART, and

a. IDB-C is authorized to modify its 15.2-meter Revised Standard A earth station at Staten Island, New York, which was authorized under File No. CSG-88-010-P/L, to add emissions 76K8G7W, 154KG7W, 307KG7W, 614KG7W, and 1M72G7E for the provision of IDR switched digital voice, record, and data services via INTELSAT AOR satellites;[4]

b. IDB International is authorized to:

1) lease from Comsat and operate three E-1 (2.048 Mbps) satellite channels between its Staten Island, New York earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar channels between the satellite and earth stations in the U.S.S.R. and Guyana;

2) lease and operate any necessary domestic facilities; and

3) use said facilities to provide IDR services via INTELSAT, including switched voice, record, and data communications service, between the U.S. and the U.S.S.R. (one E-1 channel) and between the U.S. and Guyana (two E-1 channels), and beyond.

8. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

9. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between IDB International and its correspondents in the U.S.S.R. and Guyana and copies of the agreements shall be filed with the Commission within 30 days of execution.

10. IT IS FURTHER ORDERED that IDB International shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

11. IT IS FURTHER ORDERED that IDB International shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the U.S. and all countries IDB International is authorized to serve within 90 days from the end of each calendar quarter.

12. IT IS FURTHER ORDERED that IDB International shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

13. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, the applicant shall provide the Commission with a summary of equipment actually installed.

14. IT IS FURTHER ORDERED that all authority requested in application File No. I-T-C-91-020 not granted herein is hereby DENIED.

15. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Earth Station Ownership, 100 FCC 2d 250 (1984).

[2] *Id.* at 284

[3] The Commissions's International Competitive Carrier decision requires even non-dominant carriers to file an initial application pursuant to Section 63.01 of the Commission's Rules to provide each service product to each individual country. IDB International, as a dominant carrier, must file Section 214 applications for all circuitry it wishes to acquire and operate to all countries. *See* International Carrier Policies, 102 FCC 2d 812, 842-845 (1985).

[4] This authorization is not to be construed as permitting the provision of any service between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCC COMMUNICATIONS LIMITED PARTNERSHIP — File No. I-T-C-91-042

Application for authority to provide communication services between Military Personnel stationed in Saudi Arabia and locations in the U.S.

ORDER AND AUTHORIZATION

Adopted: May 13, 1991; Released: May 20, 1991

By the Chief, International Facilities Division:

1. The above-captioned application filed on December 13, 1990 by MCC Communications Limited Partnership (MCC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide inbound message telephone service for calls originated by U.S. military personnel stationed in Saudi Arabia to telephones in the U.S. The application was placed on public notice on December 13, 1990. Worldcom Communications Inc. (Worldcom) filed a contingent petition to deny requesting that MCC clarify the fact that Worldcom is not involved in the service. In its response, MCC states that it has made clear to the Saudi Arabian Administration that Worldcom is not involved in the proposed service. No other comments were received.

2. On December 20, 1990, the Commission granted temporary authority for the requested service. The grant of authority was based on the fact that the Saudi Arabian telephone system does not have sufficient capacity to handle the sudden influx of military personnel and thus the Saudi Arabian government has agreed to the instant proposal. The calls will be routed via the Andover, Maine earth station to New York, where they will be turned over to Advanced Telecommunications Corp. (ATC) to be routed to Atlanta, Georgia to where they will be processed by U.S. Tele-Data. The calls to be handled will be inbound only because of the unique circumstances, we will grant permanent authority to use all of the T-1 circuits requested in the formal application, to continue as long as the consent of the Saudi Arabian Administration remains in forth.

3. Upon consideration of the application and in view of the foregoing, we find that authorization of the requested services and facilities is required by the public convenience and necessity.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-91-042 IS GRANTED, and MCC is authorized to:

a. lease from MCI and operate a total of nine T-1 circuits between the Andover, Maine and INTELSAT's satellite located at 359-S East Longitude;

b. lease the necessary connecting facilities between the Andover, Maine earth station and New York City; and

c. use said facilities to provide inbound switched message telephone service for U.S. military installations in Saudi Arabia to the U.S.

5. The authority granted herein shall not be considered as precedent for future Commission actions on requests for authority to resell private lines.

6. The authority granted herein shall continue only as long as MCC retains authority to provide such service from the Saudi Arabian Administration.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP — File No. I-T-C-91-085

Application for authority to acquire and operate facilities for service between the U.S. and U.S.S.R.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 13, 1991; Released: May 20, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to the U.S.S.R. by US Sprint.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-085 IS GRANTED, and US Sprint is authorized to:

a. lease from Comsat and operate 12 voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in the U.S.S.R. furnished by US Sprint's correspondent in the U.S.S.R.;

b. lease from AT&T and operate 12 voice-grade circuits in the Etam, West Virginia earth station; and

c. use said facilities to provide US Sprint's regularly authorized services between the U.S. and the U.S.S.R. and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between US Sprint and its correspondent in the U.S.S.R. and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY	File No. I-T-C-91-038
GTE HAWAIIAN TELEPHONE COMPANY INCORPORATED	File No. I-T-C-91-036
MCI INTERNATIONAL, INC.	File No. I-T-C-91-045
TRT/FTC COMMUNICATIONS, INC.	File No. I-T-C-91-051
US SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP	File No. I-T-C-91-026
WORLD COMMUNICATIONS, INC.	File No. I-T-C-91-007

Applications for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Acquire and Operate Capacity in the North Pacific Cable System.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: May 13, 1991; **Released: May 20, 1991**

By the Chief, Common Carrier Bureau:

1. We have under consideration the above-captioned applications requesting authority to acquire capacity from Pacific Telecom Cable, Inc. (PTC) and to operate that capacity in the North Pacific Cable (NPC) system for the provision of authorized common carrier services between the United States and points in the Pacific Ocean region (POR). The NPC system is a private, non-common carrier, digital optical fiber cable system which extends between landing points at Pacific City, Oregon; Seward, Alaska and Miura, Japan.[1] Applications File Nos. I-T-C-91-007, I-T-C-91-026, I-T-C-91-036, I-T-C-91-038, I-T-C-91-045 and I-T-C-91-051 were placed on public notice on October 18, 1990, November 15, 1990, December 5, 1990, December 12, 1990, January 9, 1991 and January 25, 1991, respectively. No comments pertaining to these applications were received.

I. THE APPLICATIONS

2. In application File No. I-T-C-91-038, the American Telephone and Telegraph Company (AT&T) requests authority to acquire on an ownership basis and operate one-half interests in 810 64 kilobits per second (Kb/s) circuits in the NPC system between the Oregon and Japan cable terminals.[2] AT&T further requests authority to acquire by lease such connecting facilities as may be necessary to extend said NPC circuits and to activate the requested NPC circuits and connecting facilities to provide its authorized telecommunications services. AT&T states that it will pay a sum of not more than $15,000 per one-half 64 Kb/s circuit in the NPC system. AT&T further states that grant of the authority it requests will serve the public interest by permitting it to respond to increasing demand for transpacific digital services. AT&T asserts that grant of its application will not adversely impact other common carrier facilities for which AT&T has received authorization.

3. By application File No. I-T-C-91-036, GTE Hawaiian Telephone Company Incorporated (GTE Hawaiian Telephone) requests authority to acquire on an IRU basis one-half interests in 90 64 Kb/s circuits in the NPC system between the Oregon and Japan cable terminals.[3] GTE Hawaiian Telephone states that it will pay $15,410 per one-half 64 Kb/s circuit in the NPC system. GTE Hawaiian Telephone further states that grant of its application will serve the public interest as the requested facilities will be used to fulfill the need for additional direct circuits to Japan. GTE Hawaiian Telephone notes that it will not be able to use the requested NPC circuits until completion of the Haw-5 cable between the United States Mainland and Hawaii in 1993 but states that it is more economical and efficient to purchase the requested NPC circuits at this time.

4. By application File No. I-T-C-91-045, MCI International, Inc. (MCII) requests authority to acquire on an ownership basis one-half interests in 1260 64 Kb/s circuits in the NPC cable system.[4] MCII also requests authority to acquire and operate domestic connecting facilities. MCII states that the requested facilities will be used to provide services that it is now or may in the future be authorized to provide between the United States, Japan and Alaska.

5. By application File No. I-T-C-91-051, TRT/FTC Communications, Inc. (TRT/FTC) requests authority to acquire on an ownership basis one-half interests in 750 64 Kb/s circuits in the NPC system between the Oregon and Japan terminals.[5] TRT/FTC also requests authority to acquire facilities on an ownership, IRU or lease basis in cable systems beyond Japan and between cable terminals in Japan for extension of the NPC circuits as well as to lease connecting facilities in the United States. TRT/FTC states that it will pay a cost not to exceed $15,410 per one-half 64 Kb/s circuit in the NPC system. TRT/FTC further states that the requested facilities are required to meet anticipated growth in its services.

6. By application File No. I-T-C-91-026, US Sprint Communications Company Limited Partnership (Sprint) requests authority to acquire on an ownership basis one-half interests in 1530 64 Kb/s circuits in the NPC system between the Oregon and Japan cable terminals.[6] Sprint

also requests authority to acquire on an ownership, IRU or lease basis connecting facilities between existing and planned cable terminals in Japan required to extend the requested NPC circuits in cable systems beyond Japan. Sprint states that it will pay a cost not to exceed $15,410 per one-half 64 Kb/s circuit in the NPC system. Sprint further states that it has insufficient capacity in existing transpacific digital, optical fiber cable systems to satisfy its present and reasonably foreseeable requirements between the United State and POR points. Sprint asserts that the only means for satisfying these demands in this timeframe is acquisition of additional cable facilities in the NPC system.

7. By application File No. I-T-C-91-007, World Communications, Inc. (Worldcom) requests authority to acquire, on an ownership basis, one-half interests in 150 64 Kb/s circuits in the NPC system between the Oregon and Japan cable terminals. Worldcom also requests authority to acquire on an ownership, IRU or lease basis capacity in facilities between existing and planned cable terminals in Japan required to extend the requested NPC circuits in cable systems beyond Japan. Worldcom further requests authority to acquire on an IRU or lease basis necessary domestic entrance channel facilities. Worldcom states that it will pay a cost not to exceed $15,410 per one-half 64 Kb/s circuit in the NPC system. Worldcom further states that it has insufficient capacity in existing transpacific digital, optical fiber cable systems to satisfy its present and reasonably foreseeable requirements between the United States and Japan, Korea and Hong Kong. It asserts that the only means for satisfying these requirements is through acquisition of additional cable capacity on the NPC system.

II. DISCUSSION

8. In 1985, the Commission adopted its private submarine cable policy to promote competition in the provision of international facilities.[8] It determined that an increase in competition in the provision of facilities would stimulate technology and service development to the benefit of international telecommunications users. The Commission did not preclude the possiblity that common carriers would be permitted to acquire capacity in private submarine cables for the provision of the carriers' services. It stated that it would require carriers interested in acquiring capacity in private cable systems to seek authority under Section 214 of the Communications Act.[9] However, the Commission emphasized that private cable systems shall succeed or fail on their own merits and not through Commission action that would guarantee common carrier use of any private cable system. The Commission reiterated these policies in its *Conditional License* for the NPC cable system.[10]

9. We find that grant of the instant applications will promote the policy aims of the Commission's *Private Submarine Cable* decision. In decisions granting applications of common carriers seeking to acquire capacity in the PTAT-1 private submarine cable system, we found that use of a portion of that cable system for the provision of common carrier services would enhance the viability and credibility of PTAT-1 as an alternative to common carrier facilities.[11] Here, as with PTAT-1, such use will facilitate the introduction of competition in the provision of international transmission facilities. The Commission has made it clear that the introduction of facilities-based competition into a market is a significant and positive step that is beneficial to the public.[12] Such competition will give service providers greater choice in selecting facilities and thus enable them to maintain, or improve, the economical and efficient provision of their services to the public. The opportunity to choose between facilities will further enable service providers to be more responsive to customer needs in terms of price, service, quality, and service availability. The proposals contained in the applications before us, to convert a portion of the capacity of the NPC system to common carrier use, will result in these types of public benefits being extended to the POR.

10. We find that the applicants have provided the information necessary for us to grant their applications.[13] In addition we find that the circumstances surrounding the instant applications do not raise an economic impact issue.[14] Indeed all of the applicants indicate that the NPC system capacity they seek to acquire will be used to supplement their authorized common carrier facilities, not to divert traffic from those facilities. All of the applicants will continue to use their current cable and satellite facilities for the provision of common carrier services. Moreover, no party has filed comments arguing that an adverse economic impact would result from the applicants' use of the requested NPC capacity for common carrier services. Therefore, we find that when the applications are viewed individually, or even when they are viewed jointly, the factors presented in this case do not warrant consideration of an economic impact issue.

11. The applicants herein are seeking authority to acquire one-half interests in circuits in the United States portion of the NPC system on an ownership basis. We require United States carriers acquiring ownership interests in a submarine cable to become parties to the cable landing license for that cable.[15] Therefore, we shall condition our authorizations herein upon the applicants each filing appropriate applications seeking modification of the *Final License* for the NPC system to add themselves as licensees of that cable system.

12. We also observe that the *Final License* for the NPC system contains a condition requiring PTC to maintain a fifty percent ownership and voting control of the NPC system, including one hundred percent ownership in the cable stations in Oregon and Alaska.[16] Sale of ownership interests in the NPC system raises questions regarding PTC's compliance with this condition. Therefore, we shall serve a copy of this decision on PTC and request that it either explain how it remains in compliance with the subject condition or seek such modification of the condition as it may deem appropriate. We shall also condition the authorizations granted herein upon the outcome of any future proceedings with PTC regarding this matter.

13. In view of the foregoing, we find that grant of authority for the applicants to acquire the NPC circuits they request will serve the public interest.

III. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, that the applications of AT&T (File No. I-T-C-91-038), GTE Hawaiian Telephone (File No. I-T-C-91-036), MCII (File No. I-T-C-91-045), TRT/FTC (File No. I-T-C-91-051),

Sprint (File No. I-T-C-91-026) and Worldcom (File No. I-T-C-91-007) ARE GRANTED, subject to the following terms,[17] conditions and limitations.

15. AT&T is authorized to:

(a) acquire one-half interests in 810 64 Kb/s circuits in the NPC system between the Oregon and Japan cable terminals;

(b) lease such connecting facilities as may be necessary to extend said NPC circuits; and

(c) use the facilities authorized herein to provide its authorized services.

16. GTE Hawaiian Telephone is authorized to:

(a) acquire one-half interests in 90 64 Kb/s circuits in the NPC system between the Oregon and Japan cable terminals; and

(b) use the facilities authorized herein to provide its regularly authorized services.

17. MCII is authorized to:

(a) acquire one-half interests in 1260 64 Kb/s circuits in the NPC system between the Oregon and Japan cable terminals;

(b) acquire domestic connecting facilities; and

(c) use the facilities authorized herein to provide the services it is now or may in the future be authorized to provide between the United States mainland, Alaska and Japan.

18. TRT/FTC is authorized to:

(a) acquire one-half interests in 750 64 Kb/s circuits in the NPC system between the Oregon and Japan cable terminals;

(b) acquire facilities on an ownership, IRU or lease basis in cable systems beyond Japan and between cable terminals in Japan for extension of said NPC circuits to Korea, Hong Kong, Singapore and Taiwan;

(c) lease domestic connecting facilities; and

(d) use the facilities authorized herein to provide its authorized common carrier services between the United States and Japan and beyond except for France.

19. Sprint is authorized to:

(a) acquire one-half interests in 1530 64 Kb/s circuits in the NPC system between the Oregon and Japan cable terminals;

(b) acquire on an ownership, IRU or lease basis capacity in facilities between existing and planned cable terminals in Japan required to extend these NPC circuits in cable systems beyond Japan; and

(c) use the facilities authorized herein to provide its authorized services between the United States and Japan, Korea, Hong Kong, Malaysia, the Philippines Singapore, Taiwan and Thailand.

20. Worldcom is authorized to:

(a) acquire one-half interests in 150 64 Kb/s circuits in the NPC system between the Oregon and Japan cable terminals;

(b) acquire on an ownership, IRU or lease basis capacity in facilities between existing and planned cable terminals in Japan required to extend the these NPC circuits in cable systems beyond Japan;

(c) acquire on an IRU or lease basis necessary domestic entrance channel facilities; and

(d) use the facilities authorized herein to provide its authorized services between the United States and Japan, Korea and Hong Kong.

21. IT IS FURTHER ORDERED that the authorization issued to TRT/FTC herein is subject to the terms and conditions set forth in FTC Communications, Inc., 4 FCC Rcd 5633 (1989).

22. IT IS FURTHER ORDERED that the applicants each shall file an application to modify the *Final License* for the NPC system, *see* 4 FCC Rcd 8061 (1989), to include themselves as licensees of the cable system.

23. IT IS FURTHER ORDERED that the authorizations granted herein are subject to the results of any further proceedings regarding PTC's compliance with the conditions of the *Final License* for the NPC system.

24. IT IS FURTHER ORDERED that these authorizations are issued subject to the terms and conditions of any license issued to PTC under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§ 34-39).

25. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Pacific Telecom Cable, Inc., 2 FCC Rcd 2686 (Com. Car. Bureau (1987) (Conditional License) and Pacific Telecom Cable, Inc., 4 FCC Rcd 8061 (1989) (Final License).

[2] While the AT&T application indicates that AT&T will acquire the one-half interests in the NPC circuits on an ownership basis, the Supplemental Agreements to the North Pacific Cable Construction and Maintenance Agreement, filed on a confiden-

tial basis by PTC, indicate that AT&T will acquire those portions of the circuits between the Oregon cable landing point and the Oregon cable terminal (Segment B2) and in the Oregon cable terminal (Segment B3) on an indefeasible right of user (IRU) basis. According to the Supplemental Agreements, only that portion of the circuits between the Oregon cable landing point and the midpoint of the NPC system (Segment B1) will be acquired by AT&T on an ownership basis. We shall therefore grant AT&T authority to acquire those portions of the subject NPC circuits in Segments B2 and B3 on an IRU basis and that portion of the circuits in Segment B1 on an ownership basis.

[3] While its application indicates that it will acquire the NPC circuits it seeks on an IRU basis, the Supplemental Agreements filed by PTC indicate that GTE Hawaiian Telephone will acquire that portion of the NPC circuits in Segment B1 on an ownership basis and those portions of the circuits in Segments B2 and B3 on an IRU basis. Therefore, we shall grant GTE Hawaiian Telephone authority to acquire the portion of the subject NPC circuits in Segment B1 on an ownership basis.

[4] The Supplemental Agreements filed by PTC indicate that MCII will acquire the portion of the NPC circuits in Segment B1 on an ownership basis and those portions of the circuits in Segments B2 and B3 on an IRU basis. Therefore, we shall grant MCII authority to acquire the NPC circuits it seeks in this manner.

[5] TRT/FTC requests authority to acquire the portion of the NPC circuits in Segment B1 on an ownership basis and to acquire those portions of the NPC circuits in Segments B2 and B3 on an IRU basis.

[6] Sprint seeks authority to acquire the portion of the circuits in Segment B1 of NPC on an ownership basis and the portion of the circuits in Segments B2 and B3 on an IRU basis.

[7] Worldcom seeks authority to acquire the portion of the circuits in Segment B1 of NPC on an ownership basis and the portion of the NPC circuits in Segments B2 and B3 on an IRU basis.

[8] Tel-Optik, Limited, 100 FCC 2d 1033 (1985) (Private Submarine Cable).

[9] The Commission restated this requirement in the International Competitive Carrier decision where it determined that it would require non-dominant carriers to file Section 214 applications to acquire capacity in future private cable systems. International Carrier Policies, 102 FCC 2d 812, 845 (1985).

[10] *See* Pacific Telecom Cable, Inc., 2 FCC Rcd 2686, 2688 (1987).

[11] *See* US Sprint Telecommunications Company Limited Partnership, 4 FCC Rcd 6279, 6282 (Com. Car. Bur. 1989) and CICI, Inc., 4 FCC Rcd 6622, 6623 (Com. Car. Bur. 1989).

[12] *See also* In the Matter of Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046 (1985).

[13] The Commission places no special burdens on any carrier making an application for private cable capacity. It requires carriers to provide the information required by the Commission's Rules to be contained in a Section 214 application. *See* Pacific Telecom, Inc., 4 FCC Rcd 4454 (1989) (Clarification Order).

[14] The Commission stated that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." Clarification Order, 4 FCC Rcd at 4456.

[15] *See* Puerto Rico Telephone Company, 5 FCC Rcd 100 (Com. Car. Bur. 1990).

[16] The relevant condition provides that:

> The Licensee shall maintain no less than a fifty percent ownership and voting control share in the proposed cable, including one hundred percent ownership in the cable station in Oregon and in Alaska (and any additional U.S. landing points) and in the U.S. land portion of the cable from the station to the U.S. beach joint of the submersible portion of the proposed cable;

4 FCC Rcd at 8069.

[17] In all instances where an applicant is authorized to acquire NPC circuits, the portion of those circuits in Segment B1 of the NPC system is authorized to be acquired on an ownership basis and those portions of such circuits in Segments B2 and B3 are authorized to be acquired on an IRU basis.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 14, 1991

Released: May 22, 1991

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Mountain Signals, Inc., Licensee 8210-BH
Radio Station WETB(AM) C12-468
Rt. 4, Brandonwood Drive
P.O. Box 4127 CRS
Johnson City, TN 37602-4127

Dear Sir or Madam:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On July 24, 1989, you filed an application for an assignment of license for Station WETB(AM) (File No. BAL-890724EE) from Alpha-Omega Broadcasting, Inc. ("Alpha") to Mountain Signals, Inc. ("Mountain Signals"). As a result of questions raised by the filing, the Audio Services Division asked for a clarification of the agreement between the parties to the assignment. On October 11, 1989, William J. Cockett, counsel for Mountain Signals, sent the Commission a memorandum describing those circumstances.

As explained in that narrative, Mountain Signals originally sold WETB(AM) to Alpha on July 8, 1987, and retained a security interest in the real and personal property of the station. Alpha thereafter failed to abide by the terms of the agreement between it and Mountain Signals. After this default, Trevor Swoyer, Alpha's president, agreed to convey the real property (by deed) and the personal property (by possession) back to Mountain Signals, and further agreed not to contest any foreclosure proceeding instituted by Mountain Signals with respect to the personal property, which had been pledged as collateral on another loan. On the day this agreement was reached, May 5, 1989, Mountain Signals took over the operation of the station.

On December 5, 1990, the Commission granted the assignment of license application, as well as a renewal of license, but expressly did so without prejudice to any action that the Commission might deem appropriate regarding the events described above.

Under Section 310(d) of the Communications Act of 1934, as amended, no station license or the rights thereunder shall be transferred, assigned or disposed of in any manner except upon application to the Commission, and upon a finding by the Commission that the public interest, convenience and necessity will be served thereby. Although a licensee may delegate certain functions to an agent or employee who may operate the station on a day-to-day basis, the licensee may not abdicate ultimate responsibility over all matters involving the operation of a broadcast facility. *See Bee Broadcasting Associates*, 3 FCC Rcd 4323, 4327 (1988); *Alabama Educational Television Commission*, 33 FCC 2d 495, 506 (1972).

Section 73.3540(a) of the Commission's Rules states that:

> Prior consent of the FCC must be obtained for a voluntary assignment or transfer of control.

Mountain Signals' action in taking over operation of the station on May 5, 1989, prior to Commission approval, resulted in an unauthorized transfer of control, in violation of Section 310(d) of the Communications Act and Section 73.3540(a) of the Commission's Rules. Moreover, Mountain Signals' action in applying to the Commission for consent to the transfer indicates a knowledge of the statute and the Commission's Rule, but its timing in operating the station before receiving that consent demonstrates a lack of concern in complying with those obligations.

This Notice of Apparent Liability for a Monetary Forfeiture of Ten Thousand Dollars ($10,000.00) is issued for willful and continuing violation of Section 310(d) of the Communications Act of 1934, as amended, and 47 C.F.R. Section 73.3540(a). You were in violation of the statute and the Rule from May 5, 1989, until December 5, 1990. The amount of the proposed forfeiture is based on the factors discussed in Section 503(b)(2) of the Communications Act of 1934, as amended.

The attachment summarizes the actions you may take in response to this Notice, as provided in 47 C.F.R. Section 1.80. If you wish to make a claim of financial inability to pay this Notice of Apparent Liability, Section I(B) of that attachment is informative on how to make such a showing.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart,
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-584

In re Applications of

EDWIN A. BERNSTEIN	File No. BPH-870330NC
RADIO CENTER MORICHES LIMITED PARTNERSHIP	File No. BPH-870331MV
DAKK, INC.	File No. BPH-870331ND
FRIENDSHIP COMMUNICATIONS, LTD.	File No. BPH-870415KS
HAMPTONS COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870415KY

For Construction Permit for New FM Station, Channel 241A, Center Moriches, New York

MEMORANDUM OPINION AND ORDER

Adopted: May 10, 1991; Released: May 23, 1991

By the Review Board: MARINO (Chairman) and BLUMENTHAL. Board Member ESBENSEN issuing Dissenting Statement.

1. The Board has before it the *Initial Decision*, 5 FCC Rcd 6629 (1990) (*I.D.*), of Administrative Law Judge Edward Luton (ALJ) in the above-captioned case. It also has before it the parties' exceptions to the *I.D.* and replies to those exceptions. Oral argument on the exceptions was held on May 3, 1991.

2. The *I.D.* awarded the Construction Permit at contest to Dakk, Inc. *Inter alia*, however, the exceptions before the Board contend that the ALJ erred in refusing to add a financial issue against Dakk because, in the view of the exceptors, the evidence indicated that Dakk lacked reasonable assurance of a firm financial commitment from its purported lender when it affirmatively certified to such assurance in its filed application. [1]

3. Initially, we note that not once, but twice, the ALJ considered the very arguments now repeated in the exceptions, yet declined to enlarge the issues as requested. *See Memorandum Opinion and Order*, FCC 89M-2302, released September 19, 1989; *Memorandum Opinion and Order*, FCC 90M-289, released February 15, 1990. There, as here, a financial issue was sought on the claim that Dakk had no valid basis to rely upon Midlantic North for its proposed financing because (1) while Midlantic's commitment letter of March 23, 1987 is addressed personally to Dakk's sole principal, Craig Foster, and states that "during our discussions with you, we have become familiar with Dakk's business plans," Foster freely concedes that he did not personally hold any discussions with Midlantic North; and (2) that, at deposition, Foster also conceded that he did not know whether Midlantic North had been provided with his personal financial statement or what security would be required for the potential loan. Bernstein Exceptions at 11 (citing Tr. 78, 87-89). In view thereof, and citing *Shawn Phelan*, 5 FCC Rcd 53 (Rev. Bd. 1990), Bernstein contends that an issue was (and remains) warranted to determine whether the March 1987 missive from Midlantic North was no more than an "accommodation," having no substantive efficacy.

4. Both below, and here, Dakk justified its reliance on the 1987 Midlantic North letter, based on the following assertions. First, although Dakk admits that Foster personally made no documentary submissions relative to a loan to Midlantic North and had no personal discussions with that institution, Dakk's business plan (including Foster's personal 1987 financial statement) was, in fact, supplied to the bank by Dakk's special financial consultant, Jeffrey Fahrer, [2] who discussed Dakk's needs with Midlantic North Vice President, Anthony Ambrutis, who in turn authored the March 1987 letter on which Dakk here relies. *See* Dakk Reply at 6-12. Second, it contends that, although the Midlantic North letter "does not explicitly mention 'collateral,' the letter still provides reasonable assurance," because it specifies that the construction loan will be "unsubordinated." *See id.*, at 7-8.

DISCUSSION

5. In *Scioto Broadcasters*, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *aff'd*, 6 FCC Rcd 1988 (1991), the Board rehearsed the Commission's financial "reasonable assurance" standards and held that:

> in order for the Board to determine that an applicant has "reasonable assurance" of "committed sources of funds" from a lending institution, we will review the following factors: Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979), that *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts, the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed, *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987),

that adequate collateral has been demonstrated, *Chapman Radio*, *supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender. As noted above, where these fundamentals have been absent in recent cases, the Board has found no "reasonable assurance." *See, e.g., Rebecca Boedker*, *supra*; *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7046 (Rev. Bd. 1989). Conversely, where these fundamentals have been satisfied, we have found such "reasonable assurance." *See, e.g., Colonial Communications, Inc.*, 5 FCC Rcd 1967 (Rev. Bd. 1990), *recon. denied*, FCC 90R-52, released June 25, 1990.

6. The March 23, 1987 Midlantic North letter to Dakk reflects by its express terms many of the "fundamentals" to which *Scioto Broadcasters* adverts, and it reads as follows:

> Dakk, Inc.
>
> 780 Third Avenue - Suite 3003
>
> New York, NY
>
> Attn: Craig Foster
>
> Dear Craig:
>
> This letter confirms the conditions under which Midlantic will provide a loan to Dakk, Inc., to construct and operate an FM station to service Suffolk County, New York. Midlantic is familiar with the financial capabilities of Dakk, Inc., and during our discussions with you, we have become familiar with Dakk, Inc.'s business plans for the proposed station. Accordingly, Midlantic is willing to consider a term loan in the amount of | *redacted* | for the construction and operation of the station. This letter is not contractually binding on the bank, however, and is subject to the following conditions:
>
> 1. The loan is specifically conditioned on receipt by Dakk, Inc., of a construction permit for the station from the Federal Communications Commission.
>
> 2. The loan will be an unsubordinated loan of [*redacted*] and revolving Line of Credit of up to [*redacted*] to cover working capital needs during the first two years of operation. The term of the loan will be ten (10) years with floating interest at two (2) points higher than the bank's prime rate at time of closing. The revolving Line of Credit will be at two (2) points above the bank's prime rate.
>
> Midlantic looks forward to working with you and your company on your broadcast venture.
>
> Yours truly,
>
> Anthony Ambrutis
>
> Vice President

In most *prima facie* respects, therefore, the subject letter meets the Commission's concerns that applicants not present a mere "accommodaton letter," all too frequently issued by indifferent commercial lending institutions having neither the slightest knowledge of, or interest in, the would-be borrower's resources, nor any earnest intention to provide a broadcast construction loan to the applicant. *See, e.g., Rebecca L. Boedker*, 5 FCC Rcd 2855, 2856-57 (Rev. Bd. 1990)(banker testifies that applicant loan letter was mere "accommodation"; bank always "unwilling" to make actual loan); *see generally Christiana Communications*, 2 FCC Rcd 1971, 1974 (1987)(hearing ordered to determine whether applicant relied on worthless "accommodation letter" from bank).

7. Based on the uncontroverted evidence placed before the ALJ, the situation before us is quite distinguishable from that encountered in *Shawn Phelan*, where the equally uncontroverted evidence showed that the applicant in question never submitted to the lending institution:

> (i) a business plan for her proposed station;
>
> (ii) written cost estimates of the station;
>
> (iii) a personal financial statement; or
>
> (iv) information of any sort concerning her own personal financial condition, assets, net worth or the like.

5 FCC Rcd at 54. We thus reject the claim that *Shawn Phelan* demands that Dakk's application be remanded on a financial issue. Insofar as the evidence here suggests, Dakk appears at least to have had serious loan negotiations with its prospective lending institution.[3]

8. At the same time, we are puzzled that the 1987 Midlantic North letter to Dakk seems to be deliberately cast *as though* the bank discussed the loan with Foster personally (no mention whatever is made of Fahrer), when no such personal discussions ever occurred. And, it is not clear from the face of the letter itself whether Midlantic North has reviewed Dakk's collateral, the nature of any such collateral, and the bank's unqualified satisfaction therewith. Nor do Dakk's pleadings of record adequately address these two enigmatic points.

9. In an effort to avert unnecessary evidentiary hearings, and following the Commission's lead in certain recent cases, the Board has on several past occasions requested supplementation of the existing record to resolve, if possible, facial ambiguities that beset an applicant's financial certification. *See, e.g., A. P. Walter, Jr.*, 5 FCC Rcd 5586 (Rev. Bd. 1990); *Colonial Communications, Inc.*, 5 FCC Rcd 51 (Rev. Bd. 1990), *aff'd* , FCC 91-127, released May 2, 1991. So too here, we believe that the record would benefit by a showing, based upon material obtained from Midlantic North, as to (1) what documentary materials the bank had before it when it issued its letter of March 1987; (2) what specific collateral it contemplated to secure the potential loan; and (3) whether it regards its March 1987 letter as genuinely intending to provide reasonable assurance of a firm commitment of a construction loan to Dakk, and in what precise dollar amount. Dakk must supply this material in verified form.[4] After we (and the other parties) have reviewed this material, we will further address in appropriate fashion the exceptions as to the 1987 financial certification by Dakk.

10. ACCORDINGLY, IT IS ORDERED, That Daak, Inc. SHALL FILE the documents ordered herein within twenty (20) days of the release date of this Order, and the other parties SHALL BE AFFORDED an opportunity to respond and/or comment with respect thereto within ten (10) days of the date of the filing of the respective documents.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Under the particular regulatory regime prevailing at the time the instant applications were filed, an applicant was required to merely "certify" (under pain of perjury) that it possessed "committed sources of funds to construct and operate for three months without revenue." *Northampton Media Associates*, 4 FCC Rcd 5117, 5118-19 (1989). Because many broadcast applicants were found to have falsely certified to their basic financial qualifications, *see Public Notice* 62 RR 2d 638, 639 (1987), the Commission has recently abandoned its failed "certification" policy in favor of a return to the fully documented financial showing requirement that existed prior to 1981. *Revision of Form 301*, 4 FCC Rcd 3853, 3858-60 (1989).

[2] At deposition, Foster initially testified that "to the best of [his] knowledge," Fahrer did not furnish Midlantic North with any documentary information disclosing Foster's financial situation at that time. Tr. 79. However, in a subsequent response to the issue enlargement request, Dakk supplied the August 22, 1989 declaration of Jeffrey Fahrer, who averred that he had, in fact, provided the bank with the Dakk business plan and the personal financial statement of Foster, the latter reflecting a February 27, 1989 net worth of $301, 320. *See* Dakk Opposition to Motion To Enlarge filed August 24, 1989 (Exhibits 2 and 3). No party here frontally challenged either the Fahrer declaration or the accuracy of the 1987 Foster financial statement.

[3] Dakk does not rely on *Multi-State Communications*, because (as he candidly testified) Foster himself had no established relationship with Midlantic North, and had never before been even a customer of that bank. Tr. 76.

[4] We recognize that the individual who signed the March 1987 Midlantic North letter, Anthony Ambrutis, is no longer with that bank, *see* Dakk Opposition To Motion To Enlarge, filed August 24, 1989 at 4 n.6, so that the question of why the letter was framed in personal terms to Foster may perhaps remain unanswered. We will be satisfied, however, if an authorized Midlantic North official reviews Dakk's loan application file, affirms its 1987 commitment to Dakk, and provides the information described in para. 9 of our text. Should Midlantic North decline to provide the information to Dakk, and its failure to do so trigger a supplemental government hearing, the subpoena power of the Commission will be available to compel a response. *See* 47 CFR § 1.340; *Dorothy O. Schulze and Deborah Brigham*, 5 FCC Rcd 3227, 3229 n.2 (uncooperative witness may be compelled by motion to federal district court); *Lamar Life Broadcasting Co.*, 43 RR 2d 1672 (1978)(motion to quash subpoena of necessary witness rejected; witness required to appear).

DISSENTING STATEMENT
OF
BOARD MEMBER ERIC T. ESBENSEN

I respectfully submit that substantial and material questions of fact concerning Dakk's financial qualifications are extant requiring an immediate remand hearing. Based on the questions raised not only the face of the Midlantic North bank letter, but because of the apparently misleading characterization of "personal" discussions between Foster and Ambrutis, I would remand for an immediate hearing to unravel the full facts and circumstances of the origins and validity of the Midlantic North letter. It is indeed doubtful, at this late date, that *anything* submitted by Dakk, which is not subject to full adversarial testing, will resolve the questions posited by the majority. This proceeding should be remanded, *forthwith*.

Before the
Federal Communications Commission
Washington D.C. 20554

MM Docket No. 90-128

In the Matter of

Amendment of Section 73.202(b), RM-7202
Table of Allotments,
FM Broadcast Stations.
(Union City, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 9, 1991; Released: May 22, 1991

By the Chief, Allocations Branch:

1. At the request of Twin States Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 1735 (1990), proposing the allotment of Channel 289A to Union City, Tennessee, as that community's second local FM service. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 289A to Union City, Tennessee, since it could provide the community with an additional FM service. Channel 289A can be allotted to Union City in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.7 kilometers (6.6 miles) north.[1] in order to avoid short-spacings to Station WAKQ(FM), Channel 288A, Paris, Tennessee, and Station WGKX(FM), Channel 290C, Memphis, Tennessee.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 8, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Union City, Tennessee	285A, 289A

4. The window period for filing applications will open on **July 9, 1991,** and close on **August 8, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 289A at Union City are North Latitude 36-31-01 and West Longitude 89-05-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-30

In the Matter of

Amendment of Section 73.202(b),	RM-7191
Table of Allotments,	RM-7361
FM Broadcast Stations.	
(Rock Island, Moses Lake	
and Warden, Washington) [1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 13, 1991; Released: May 23, 1991

By the Chief, Allocations Branch:

1. At the request of KXA Radio Corporation ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 5 FCC Rcd 667 (1990), proposing the substitution of Channel 258C3 for Channel 258A at Rock Island, Washington, and the modification of Station KXAA(FM)'s permit to specify operation on the higher powered channel. In order to accomplish the upgrade at Rock Island, the Commission also proposed the substitution of Channel 242A for Channel 257A at Moses Lake, Washington, and the modification of KSEM, Inc.'s ("KSEM") license for Station KDRM(FM) to specify operation on the new channel. KSEM was issued an *Order to Show Cause* why its license for Station KDRM(FM) should not be modified to specify operation on Channel 242A in lieu of 257A at Moses Lake. Petitioner filed comments reaffirming its intention to apply for the channel, if allotted. After the close of the comment period, petitioner filed a request to dismiss its proposal. [2] Warden Broadcasting Associates ("WBA") filed and subsequently withdrew a counterproposal requesting the allotment of Channel 242C3 at Warden, Washington, as that community's first local service. [3] In accordance with Commission policy, we will grant the dismissal requests filed by petitioner and WBA. [4]

2. Accordingly, IT IS ORDERED, That the petition for rule making and order to show cause filed by KXA Radio Corporation (RM-7191) and the counterproposal filed by Warden Broadcasting Associates (RM-7361) ARE DISMISSED.

3. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

4. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The community of Warden has been added to the caption.

[2] In accordance with Section 1.420(j) of the Commission's Rules, petitioner submitted a statement that it has not received or been promised any consideration for the withdrawal of its proposal. Therefore, the comments filed by KSEM, KPQ Radio and KWWW-AM and FM are moot and will not be discussed.

[3] Public Notice of the filing of the counterproposal was given on May 7, 1990, Report No. 1816. In accordance with Section 1.420(j) of the Commission's Rules, WBA submitted a statement that it has not received or been promised any consideration for the withdrawal of its counterproposal.

[4] A counterproposal requesting the allotment of Channel 242C3 to Royal City, Washington, was filed by Jon Bruce Thoen ("Thoen"). Thoen's counterproposal was late-filed and was not served on the petitioner as required by Section 1.420 of the Commission's Rules. Therefore, it will not be considered in this proceeding. However, in light of the dismissal of the proposals by petitioner and WBA, Thoen's request to allot Channel 242C3 to Royal City, Washington, has been accepted as a new petition, and it will be the subject of a separate Notice of Proposed Rule Making.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-595

In the Matter of

Amendment of Section 73.606(b), RM-6433
Table of Allotments,
TV Broadcast Stations.
(Casper and Sheridan,
Wyoming)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 14, 1991; Released: May 22, 1991

By the Chief, Allocations Branch:

1. At the request of Jessica Longston ("Longston"), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 701 (1989), issued in response to a petition for rule making proposing the reallotment of a vacant and unapplied for VHF Television Channel 9 to Casper, Wyoming, from Sheridan, Wyoming. Longston filed comments reaffirming her intention to apply for the channel, if allotted. SJL of Montana Associates Limited Partnership ("SJL") and Wentronics, Inc., d/b/a United Cable Television of Wyoming ("United"), filed comments opposing the proposal, and Longston filed reply comments.

2. In her comments, Longston argues that Casper (population 51,016), [1] with three times the population of Sheridan (population 15,146), is served by only one commercial VHF service, while Sheridan, already served by two commercial VHF services, has Channel 9 lying fallow. She maintains that the public interest would be served by the reallotment of Channel 9 to Casper.

3. In opposition, SJL argues that the Channel 9 allotment should remain in Sheridan and states its intention to file an application for a construction permit for that channel. [2] SJL states it is taking these steps to preserve its long-standing service to Sheridan and surrounding communities. SJL notes that it has operated a 100 watt television translator, K07HC, on Channel 7 in Sheridan for 27 years and K07HC translates the signal of SJL's television Station KTVQ, operating on Channel 2 in Billings, Montana. SJL argues that K07HC is considered to be the main competition for KSGW-TV, Channel 12, Sheridan, [3] the only full-power television station licensed to the community, and is generally viewed as Sheridan's "local" channel because Billings, Montana, is much closer to Sheridan than is Rapid City, South Dakota. In addition, K07HC serves as the link by which the KTVQ signal is provided to a number of community owned and operated translators. K07HC also provides a signal cable system to other communities, without which many of these translators and cable systems could not be economically provided with the KTVQ signal. SJL maintains that deletion of Channel 9 from Sheridan would damage and disrupt its ability to provide this important service to Sheridan and the surrounding communities. SJL argues that because the Commission has granted an application for a full-power television station on Channel 7 in Sheridan, which will force K07HC off the air, SJL's only alternative is to apply for the vacant allocation for Channel 9 in Sheridan. Therefore, claims SJL, the reallotment of Channel 9 from Sheridan to Casper would not be in the public interest.

4. In its opposition, United argues that the location of the proposed reallotment of Channel 9 to Casper would result in the complete obliteration of its ability to receive KUSA-TV, Channel 9, at Denver, Colorado. It also states that a Channel 9 transmitter, if placed in accordance with the Commission's site restriction, would destroy its ability to receive KUSA-TV at its Summit receive site and would have an adverse impact on 60% of all area homes which subscribe to United's cable television service in Casper and surrounding communities. Apart from the technical interference which would result from the placement of the Channel 9 at the proposed location, United cites the fact that Channel 13, allotted to Casper, remains vacant. Therefore, based on the significant detrimental impact the reallotment would have and the availability of Channel 13 to Casper, United believes reallotment would not be in the public interest.

5. In reply, Longston states that the comments set forth in SJL and United's oppositions are not valid grounds to block the Commission's proposed reallotment of Channel 9 to Casper. Longston argues that SJL's objections to the proposed reallotment of Channel 9 to Casper because it wants to use that frequency to continue its translator service at Sheridan is not a public interest concern. Longston notes that the Commission has consistently held that it will not consider the preclusive effect of a television channel allotment decision on translators, citing *Television Translator Stations (Florida Keys System)*; 64 RR 2d 1103 (1988); *TV Channel Assignment at San Diego, California*, 47 RR 2d 1627 (Broadcast Bur. 1980); and *Television Channel Assignments*, 45 RR 2d 359 (Broadcast Bur. 1979). Longston contends these decisions are rooted in the underlying fundamental Commission policy that a translator's use of a broadcast frequency is a secondary one which must yield to such use by a full service facility, and based on that reason alone, SJL's argument should be rejected. SJL also contends that the Commission, under its modified rules set forth in MM Docket No. 86-286, *Low Power Television and Television Translator Service*, 2 FCC Rcd 1278 (1987), has provided adequate relief for translators which are displaced by full service, in that a displaced translator licensee may submit an application to change to a channel for which no other mutually exclusive low-power or television translator applications are pending and which is not predicted to interfere with

[1] Population figures are taken from the 1980 U.S. Census.
[2] SJL's application (BPCT-891030KN) for Channel 9 at Sheridan, and Longston's petition to dismiss or deny, are pending before the Commission.
[3] KSGW is a satellite of KOTA-TV, Rapid City, South Dakota.

other applications or authorizations. Such relief is provided so that translators like K07HC may provide uninterrupted service without competition from other facilities. Longston argues that SJL has not demonstrated that there are no alternative TV channels available to take advantage of this existing relief, and that as a licensee of a secondary service, it must yield to the Commission's proposal to reallot Channel 9 at Casper, where there is an unequivocally stated desire for a full service facility.

6. Longston argues that United's sole objection to the proposed reallotment is that a television station operating on Channel 9 at Casper would interfere with its reception of a Denver distant signal at the Summit receive site. Longston maintains that United gives no authority that supports its novel proposition that the reallotment would have a direct adverse impact on 60% of the area homes which subscribe to its cable television service in Casper and surrounding communities. Longston also argues that United's situation as a cable system is analogous to those faced by land mobile and translator stations, where the Commission has consistently refused to consider the impact of its allotment decisions on those kinds of facilities and has not permitted such facilities to preclude or limit the activation of full-service television channels. Longston contends the Table of Allotments and minimum separation and protection requirements as set forth in Sections 73.606, 73.610 and 73.612 of the Rules reflect the Commission's delicate balance of providing local origination service to communities while protecting existing frequencies licensed to other communities, a balance supported by the Commission's mandate under Section 307(b) of the Commission's Act of 1934, as amended. Moreover, Longston argues that United never states that alternative methods of reception of the Denver station are unavailable to it, including reception via a nonconflicting translator or microwave frequency, or use of another reception site. Longston concludes the Commission cannot base an important allotment decision on what is easier for a cable system and should reject United's protectionist position.

DISCUSSION

7. Longston seeks to provide Casper with its fifth commercial television service by reallotting VHF Television Channel 9 from Sheridan without replacement. A staff study shows that alternative UHF Television Channels 26, 30, and 31 are available for allotment at Casper. In proposing the reallotment, the *Notice* stated that the channel at Casper was both vacant and unapplied for. However, as has been pointed out in note 2, *supra*, an application has been filed by SJL for use of the channel.

8. It is Commission policy not to reallot a channel in which interest has been expressed, absent a sufficient reason, and we find that Longston has failed to do so. *See, e.g., Montrose and Scranton, Pennsylvania*, 3 FCC Rcd 1061 (1988), *recon. denied*, 4 FCC Rcd 7799 (1989), *rev. denied*, 5 FCC Rcd 6305 (1990); *Snow Hill and Kinston, North Carolina*, 55 FCC 2d 769 (1975); *Red Oak, Iowa*, 46 FCC 2d 344 (1974); *Fond du Lac and Sheboygan, Wisconsin*, 55 RR 2d 592,594, (Pol. & Rules Div. 1984) and cases cited therein; and *Martin and Salyersville, Kentucky*, 50 RR 2d 502 (Pol. & Rules Div. 1981). While we believe that Casper is a community which merits its fifth commercial television service, we do not find that its status is a sufficiently overriding reason to overturn the Commission's policy of retaining channel allotments at communities where an interest has been expressed. Further, the fact that Channel 9 may not have been activated at Sheridan for some time after it was originally allotted does not require a finding that there is no need for its use now. On the contrary, we find that such a need is apparent by the fact that an application for its use has been filed. Finally, petitioner has not cited any case where the Commission has deleted a channel, without replacement, where interest has been expressed.

9. Based on the above discussion, we find that the Longston has failed to present a sufficient reason why Channel 9 should be deleted from Sheridan, where an application for its use has been received, and reallotted to Casper. [4]

10. Accordingly, IT IS ORDERED, That the petition for rule making filed by Jessica Longston to reallot VHF Television Channel 9 from Sheridan to Casper, Wyoming, IS DENIED.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[4] In light of this action, we need not reach the merits of the arguments herein on translator and cable systems services.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

GEOSTAR	File Nos. 1145/1146/1147-DSS-MP/ML-89
POSITIONING	CSS-89-003-(3)
CORPORATION	43/44/45-DSS-MP/ML-90
	46/48-DSS-P/LA-90
For Modification	51/52/53-DSS-EXT-90
of Space Station	CSS-90-012/013/014/015(ML)
Authorizations in	
the Radiodetermination	
Satellite Service	

ERRATUM

Released: May 21, 1991

By the Chief, Domestic Facilities Division:

This Erratum corrects two errors in *Geostar Positioning Corporation*, DA 91-528 (Released April 30, 1991).

1. Sentence 4 in Paragraph 9 is corrected to read as follows:

> These applications were placed on public notice on April 1, 1991 and a **June 3, 1991** cut-off was established for filing applications for concurrent consideration.

2. Sentence 2 in Footnote 34 is corrected to read as follows:

> The Commission also invited applications for concurrent consideration to be filed by **June 3, 1991.**

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

THE TELLESIS PARTNERS File No. 10231-CL-P-580-A-88

Permittee of Station KNKN285
a cellular system operating on
frequency Block A in the Domestic
Public Cellular Radio
Telecommunications Service
to serve the North
Dakota 1 - Divide, RSA (No. 580)

MOUNTAIN VIEW CELLULAR PARTNERS File No. 10071-CL-P-393-A-88

Permittee of Station KNKN306
a cellular system operating on
frequency Block A in the Domestic
Public Cellular Radio
Telecommunications Service
to serve the Idaho
6 - Clark, RSA (No. 393)

MOJAVE CELLULAR PARTNERS File No. 10150-CL-P-528-A-88

Permittee of Station KNKN431
a cellular system operating on
frequency Block A in the Domestic
Public Cellular Radio
Telecommunications Service
to serve the Montana
6 - Deer Lodge, RSA (No. 528)

DELTA CELLULAR PARTNERS File No. 10234-CL-P-583-A-88

Permittee of Station KNKN343
a cellular system operating on
frequency Block A in the Domestic
Public Cellular Radio
Telecommunications Service
to serve the North
Dakota 4 - McKenzie, RSA (No. 583)

SIERRA CELLULAR PARTNERS File No. 10456-CL-P-516-A-89

Permittee of Station KNKN378
cellular system operating on
frequency Block A in the Domestic
Public Cellular Radio
Telecommunications Service
to serve the Missouri
13 - Washington, RSA (No. 516)

ORDER

Adopted: May 15, 1991; Released: May 23, 1991

By the Chief, Mobile Services Division

1. Optima Cellular Partnership (Optima) has previously filed "petitions" seeking the institution of revocation proceedings against the above captioned permittees.[1] Now before us are (1) a Motion to Dismiss filed by Overland Cellular Partners (formerly The Tellesis Partners and referred to herein as Tellesis), Mountain View Cellular Partners and Mojave Cellular Partners and (2) a Request for Dismissal of Pleadings and Putative Parties filed by Delta Cellular Partners (Delta). These requests seek to remove Optima and the Committee from further participation in this matter. Oppositions have been filed by Optima and the Committee.

2. After it had evaluated the oppositions to Optima's petitions and the Committee's letter the Mobile Services Division concluded that additional information was needed and began an informal investigation. The permittees and the remaining construction permit applicant (one of the construction permit applications had already been dismissed) were requested to submit documents for inspection. The documents were produced and were made available to the Division and all those who had participated in the proceeding, including Optima and the Committee.

3. The movants contend that the dismissal of all the pending construction permit and assignment applications that were involved in this matter eliminates any basis for the continued participation of Optima or the Committee. Both movants rely on *Puerto Rican Media Action and Education Council*, 51 FCC 2d 1178 (1975), and *KSDK, Inc.*, 93 FCC 2d 893 (1983), in support of their claim that the Commission does not recognize "petitions to revoke" and that requests for the initiation of revocation proceedings are treated as informal requests under Section 1.41 of the Commission's rules. They contend that Section 312 of the Communications Act, which authorizes the Commission to invoke revocation proceedings, does not create rights in third parties. Therefore, they maintain, Optima and the Committee have no standing in this proceeding which now is solely involved in an evaluation of the permittees' qualifications to retain their authorizations.

4. In response, Optima states that the Commission has discretion to conduct an investigation of the permittees in a manner it determines best serves the public interest. Also, according to Optima, it is within the Commission's discretion to determine the extent of Optima's participation in the investigation and any revocation proceeding

that might follow. Optima indicates that as a former applicant for the markets in question and as a future applicant for these markets if the permits are revoked and new lotteries are conducted, it has established its interest in this proceeding. Optima asserts that if there is a revocation proceeding it will raise issues of law and fact that would not be raised if it is not a participant. Finally, Optima claims that its participation will allow the Commission to make efficient use of its resources in resolving the issues.

5. The Committee, which identifies itself as a voluntary association of RSA applicants formed for the purpose of monitoring the cellular lotteries, notes that it has established its standing to participate in RSA licensing proceedings (citing, *Nancy Naleszkiewicz*, DA 90-1708, released November 26, 1990 at paras. 3 to 6). The Committee indicates that it has participated in the informal investigation and has thoroughly examined the documents produced by the permittees. The Committee contends that the dismissal of the Tellesis assignment application (which was the subject of its initial filing) should have no bearing on its future participation because the Commission has, in effect, initiated a consolidated investigation regarding the permittees. The Committee claims that it has a legitimate interest in this proceeding because its members are "recent prior applicants" who will refile for these markets if they become available.

6. The motions will be granted to the extent that they seek to terminate the participation of Optima and the Committee in this proceeding. This is not a licensing proceeding where mutually exclusive applicants are deemed to have standing (as was the case in *Nancy Naleszkiewicz*, supra, where the Committee was made a party because one of its members demonstrated that he was an applicant in the market). Optima and the Committee have been permitted to participate in the preliminary stages of this proceeding because the presence of pending construction permit applications gave them some color of standing and the issues that had been raised against the applicants were related to the issues that were raised against the permittees. The dismissal of the two construction permit applications and withdrawal of the assignment proposals removes any vestige of standing that Optima and the Committee might have had. Their continued participation in the ongoing investigation is not necessary.

7. Pursuant to cases cited by the moving parties, the filings made by Optima and the Committee, including all the filings they have made subsequent to the initial petitions and letter, will be considered as informal requests. Therefore, there is no need to act on the requests to dismiss those filings.

8. Accordingly, IT IS ORDERED that the motions filed by Delta Cellular Partners and by The Tellesis Partners, Mountain View Cellular Partners and Mojave Cellular Partners ARE GRANTED to the extent indicated above and the investigation will continue without the participation of Optima or the Committee.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] When Optima initially filed its "petitions" some of the permittees had filed assignment applications which were still pending or had recently been granted. In those instances, Optima petitioned against the assignment application or sought reconsideration of its grant. In addition, The Committee for a Fair Lottery (the Committee) filed a letter requesting reconsideration of the grant of The Tellesis Partners' application to assign its permit. Optima filed related petitions against the pending construction permit applications of Delta Cellular Partners (File No. 10613-CL-P-313-A-89) and Great Western Cellular Partners (File No. 10269-CL-P-492-A-88). All the assignment applications have since been withdrawn and the two construction permit applications have been dismissed as defective.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Page-Com Hawaii, Inc.	File Nos. 24265-CD-P/LA-09-85 24265-CD-P/LB-04-85 24265-CD-P/LC-04-85
Public Land Mobile Station KNKI810	27768-CD-MP-88

Authorized to operate on frequencies 454.425, 454.500 and 454.625 MHz at Oahu, Hawaii; on 454.525 and 454.625 MHz on Maui, Hawaii; and 454.475 MHz on Hawaii, Hawaii.

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 1991; Released: May 23, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. General Telcourier, Inc. (General) has filed a Petition to Institute a License Revocation Proceeding,[1] requesting revocation of the above-captioned authorizations issued to Page-Com Hawaii, Inc. (Page-Com). At issue are allegations concerning the veracity of Page-Com's representations made to the Commission in the applications for its authorizations. For the reasons set forth below, we dismiss General's petition.

II. BACKGROUND

2. On July 25, 1985, Page-Com filed an application to provide new two-way radio common carrier service to the Hawaiian Islands of Oahu, Maui and Hawaii on a total of six UHF frequencies.[2] In December 1986, the Commission authorized Page-Com to operate on new, two-way Station KNKI810 on frequencies 454.425, 454.500 and 454.625 MHz on Oahu, on 454.525 and 454.625 MHz on Maui, and on 454.475 MHz on Hawaii, Hawaii.

III. DISCUSSION

3. In its petition, General alleges that Page-Com misrepresented in its application that there was a substantial unmet public demand for two-way mobile service in the areas it proposed to serve in Hawaii, and that it has 70 two-way held orders on Oahu. In reliance on these misrepresentations, General claims, the Commission denied objections to the application [3] and granted Page-Com's application. General also alleges that Page-Com's representations made to the Commission are inconsistent with its testimony before the Hawaii Public Utility Commission (PUC)[4] in 1988. In this regard, General notes that Page-Com indicated in its testimony before the PUC that there was no need for mobile and portable radio service on the Island of Oahu. According to General, Page-Com's testimony revealed that Page-Com's Hawaiian operations were primarily set up for one-way paging service. General contends that Page-Com's reliance on paging service violates Section 22.501 of the rules, which requires that persons using these frequencies offer both one-way and two-way service. Furthermore, General charges that Page-Com's testimony before the PUC raises questions concerning Page-Com's obligation to keep the Commission informed of any changes in the representations made earlier. In conclusion, General requests that the Commission initiate a license revocation proceeding to examine Page-Com's character qualifications and fitness to hold the captioned authorizations.

4. In opposition, Page-Com denies that there is a discrepancy between the representations it made to the Commission and its testimony before the PUC. It explains that when it filed its application in 1985 it was able to ascertain a demand for conventional mobile service because cellular service was then unavailable in Hawaii. It notes, however, that with the commencement of cellular service in Hawaii in 1986, the demand for conventional two-way mobile service has declined, which explains its testimony before the PUC. Page-Com states that it testified before the PUC that it is willing and able to provide two-way mobile service if there is a demand for such service, and that the PUC granted Page-Com a Certificate of Public Convenience and Necessity to provide statewide conventional mobile service. Finally, Page-Com argues that at the time that it filed its application, Section 22.501(b) of the Commission's rules allowed for the provision of one-way service, provided that two-way service was offered.

5. Section 312(a) of the Act states that the Commission may revoke any station license or construction permit for false statements or because of conditions coming to the attention of the Commission which would warrant refusing to grant a license or permit on an original application. 47 U.S.C. § 312(a). The decision to initiate a revocation proceeding is wholly within the Commission's discretion. *See, e.g., MCI Telecommunications Corp.*, 3 FCC Rcd 509, 513-514 (1988), *appeal pending sub nom. TeleSTAR, Inc. v. FCC*, No. 88-1153 (D.C. Cir.); *Tulsa Cable Television*, 68 FCC 2d 869, 877 (1978).

6. General has presented no evidence showing that Page-Com misrepresented facts before the Commission. At the time Page-Com filed its application for the above-captioned authorizations, our rules provided that an applicant could apply for frequencies available for two-way service to provide either one-way or paging service, so long as the two-way service was capable of being offered upon demand. *Public Land Mobile Service*, 95 FCC 2d 769, 823 (1983). Prior to grant, Page-Com's applications were reviewed to ensure that the frequencies requested could be utilized for two-way service.[5] In Page-Com's testimony before the PUC in 1988, three years after Page-Com filed its applications with the Commission, Page-Com indicated that although the availability of cellular service had overtaken the demand for conventional mobile service, it was willing and able to provide conventional mobile service. Based on this testimony, the PUC certified Page-Com as a carrier of two-way mobile service. We find no inconsistency between this testimony and the

contents of Page-Com's application before the Commission. Accordingly, we find no evidence of misrepresentation by Page-Com in its application for the captioned authorizations, or any violation of our rules.[6]

IV. ORDERING CLAUSE

7. Therefore, IT IS ORDERED THAT the Petition to Institute a License Revocation Proceeding filed by General Telcourier, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Because petitions to revoke filed by third parties are not specifically recognized under the Communications Act of 1934, as amended, (the Act), or our rules, we will treat General's petition as an informal request under Section 1.41 of our rules, 47 C.F.R. § 1.41. *See* KSDK, Inc., 93 FCC 2d 893 (1983).

[2] The Mobile Services Division (MSD) staff subsequently divided the application into three separate applications because three distinct areas were involved, with no overlap of frequency usage or service contours.

[3] On October 15, 1985, Tel-Page Corporation (Tel-Page) filed a petition to dismiss Page-Com's application, claiming, among other things, that "it is highly doubtful that there exists an unmet public demand of [the] scope represented by . . . Page-Com Hawaii, Inc." By *Memorandum Opinion and Order*, FCC Mimeo No. 5038 (Mob. Serv. Div., released June 10, 1986), the MSD dismissed Tel-Page's petition. In so doing, the MSD found, inter alia, that Tel-Page had offered no evidence to support its claim.

[4] On October 26, 1987, Page-Com filed with the Hawaii PUC a request for authorization to provide mobile telephone and paging service within the State of Hawaii. Evidentiary hearings were held on April 26 and 27, 1988. In Decision and Order Nos. 9813 (June 29, 1988) and 9827 (July 14, 1988), the PUC granted Page-Com a Certificate of Public Convenience and Necessity to provide state-wide or island-wide paging service by means of tone plus voice, tone only, digital, alpha-numeric or a combination of these paging modes, and mobile telephone service.

[5] *See* Public Notice, "Requirements to Provide Paging on Two-way Channels in Common Carrier Land Mobile Service," Mimeo No. 5785 (July 15, 1986). We also note that in Flexible allocation of frequencies in the Domestic and Public Land Mobile Service for paging and other services, First Report and Order, 4 FCC Rcd 1576 (1989), the Commission amended it rules to inter alia, permit licensees of two-way common carrier channels to offer any type of mobile two-way or one-way service. Under the amended rules, an applicant for conventional two-way mobile frequencies is no longer required to demonstrate that it is capable of offering two-way service upon demand.

[6] *Cf.*, Pass Word, Inc. v. FCC, 673 F.2d 1363, 1365 (D.C. Cir.) *cert. denied*, 459 U.S. 840 (1982) (upholding revocation based on a series of knowing and deliberate material misrepresentations to the agency).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

In the Matter of

WORKING ASSETS FUNDING SERVICE — File No. I-T-C-91-082

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 14, 1991; Released: May 23, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice service to the general public by Working Assets Funding Service (Working Assets).

2. Accordingly, IT IS ORDERED that Application File No. I-T-C-91-082 IS GRANTED and Working Assets is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

3. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT/FTC COMMUNICATIONS, INC. File No. I-T-C-91-087

Application for authority to provide international switched voice service between the U.S. and the U.S.S.R.

ORDER AND AUTHORIZATION

Adopted: May 14, 1991; Released: May 23, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the public convenience and necessity require the provision of international switched voice service between the U.S. and the U.S.S.R. by TRT/FTC Communications, Inc. (TRT/FTC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-087 IS GRANTED, and TRT/FTC is authorized to:

a. reassign its one-half interest in 22 voice-grade circuits in the TAT-6 cable, which have been previously authorized for TRT/FTC's service between the U.S. and France, to service to the U.S.S.R.; and

b. use said facilities in conjunction with facilities furnished by its correspondent in the U.S.S.R., to provide international switched voice service between the U.S. and the U.S.S.R.[1] and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] TRT/FTC states that its correspondent in the U.S.S.R., Automated Systems Users in Telecommunications (ASUT), has agreed to acquire, provide and pay for the eastern half-circuits associated with the TAT-6 facilities utilized by TRT/FTC as well as connecting European land line transiting facilities and facilities within the U.S.S.R.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

U.S. ELECTRODYNAMICS, INCORPORATED — File No. CSG-89-167-MP/L

Application for authority to construct and operate international earth station facilities at Brewster, Washington for the provision of international television service.

U.S. ELECTRODYNAMICS, INCORPORATED — File No. I-T-C-90-080

Application for authority to establish channels of communications between the Brewster, Washington earth station and INTELSAT satellites for the provision of international television service.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 15, 1991; Released: May 23, 1991

By the Chief, International Facilities Division:

1. The captioned application, File No. CSG-89-167-MP/L, filed on September 15, 1989, and supplemented on November 20, 1989, March 7, and December 27, 1990, by U.S. Electrodynamics, Incorporated (USEI), requests authority, pursuant to Title III of the Communications Act of 1934, as amended, and Sections 201(c)(4), (c)(6) and (c)(7) of the Communications Satellite Act of 1962, as amended, to construct and operate international earth station facilities at Brewster, Washington, for the provision of international television service via INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites. The application was placed on public notice on October 4, 1989. No comments were received. The applicant also requests authority to provide domestic service utilizing this facility which was granted under Call Sign E891020, File No. 2187-DSE-P/L-89 on January 5, 1990. The authorization herein will deal with the international portion of the application, and it will be treated as a modification of construction permit and license.

2. The proposed earth station modification will allow USEI's domestic 9-meter antenna to meet INTELSAT Revised Standard B technical parameters and communicate with INTELSAT satellites in the 5925-6425 MHz transmitting frequency band and the 3700-4200 MHz receiving frequency band. The 9-meter earth station is located at Brewster, Washington and will be used to provide television service to points listed in Comsat's international tariff provisions for the space segment components of television service via AOR and POR satellites when not used for domestic use.

3. The above-captioned application, File No. I-T-C-90-080, filed on March 9, 1990 by USEI, requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communications between its appropriate Brewster, Washington earth station and INTELSAT satellites for the provision of international television service between the U.S. and various overseas points. The applicant has been granted authority to establish and operate channels of communication between the U.S. and Japan, Korea, the Philippines, New Zealand and Australia for the provision of international television service.[1] This application requests authority to serve additional countries and was placed on public notice on April 4, 1990. No comments were received. Upon consideration of the application, we find that the public convenience and necessity require a grant thereof.

4. In its Report and Order in the *Earth Station Ownership Proceeding* in CC Docket No. 82-540, the Commission modified its policy on the ownership and operation of U.S. international earth stations that access the INTELSAT system by permitting carriers, individually or jointly, to own and operate their own earth station facilities.[2] In that Order, the Commission distinguished between IBS and/or television earth stations and multipurpose stations. It determined that earth stations dedicated to providing IBS and/or television services do not raise the same concerns about impact on the INTELSAT system that are raised by multipurpose stations. It also determined that the public interest requires that IBS be introduced in the United States as soon as possible. The Commission therefore concluded that it would consider only minimal legal, financial, and technical qualifications of the applicant as required by Section 308 and 319 of the Communications Act, as amended, when processing IBS and television service applications. The Commission further concluded that absent special problems, it would treat these applications as routine and expeditiously process them. [3] The Commission has granted many applications to construct and operate IBS earth stations based on this approach.[4]

5. We believe that USEI has the legal, technical and financial qualifications to construct and operate the requested facilities. USEI is already providing international television service to various points in the POR. It now proposes to add additional earth station facilities for this service. The proposed earth station shall comply with INTELSAT Revised Standard B performance criteria for television earth stations. USEI has completed the necessary frequency coordination.

6. The scope of operation of the proposed station will be the same as that permitted by the Commission in previous authorizations. We will limit the authorization to the provision of international television service. To the extent that the applicant may seek to provide certain newly proposed INTELSAT services which fall within the IBS/television service category, we will not restrict operation of the proposed station. However, it may not provide any service which falls outside the IBS/television service category. Any use of the proposed station as a multipurpose earth station would require a separate application for the additional authority.

7. Upon consideration of the applications, we find that authorization of requested services, facilities and channels of communication will be in the public convenience and necessity.

8. Accordingly, IT IS ORDERED that application File No. I-T-C-90-080 IS GRANTED, and USEI is authorized to establish channels of communication between its appropriate Brewster, Washington earth station and INTELSAT AOR and POR satellites for the provision of international television service between the U.S. and those countries that now or hereafter will be listed in Comsat's tariff provisions for the space segment of international television service. However, this blanket Section 214 authorization is without commitment as to the Commission's action on any earth station Title III applications that USEI may file in the future.

9. IT IS FURTHER ORDERED, pursuant to Sections 304, 309 and 319 of the Communications Act of 1934, as amended, and Section 201(c) of the Communications Satellite Act of 1962, as amended, that application File No. CSG-89-167-MP/L is GRANTED, and USEI is authorized to modify and operate the 9-meter C-band earth station facilities at Brewster, Washington, to provide international television service.[5]

10. IT IS FURTHER ORDERED that the applicant shall provide the Commission with a summary of the equipment actually installed, and this authorization is without prejudice to any further action the Commission might take with respect to USEI's provision of international service without appropriate authorization.

11. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

12. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between USEI and its correspondents, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Order, Authorization and Certificate released January 12, 1989, DA 88-2061, File No. CSG-88-065-AL et al., 4 FCC Rcd 565 (1989).

[2] Earth Station Ownership, 100 FCC 2d 250 (1984).

[3] Upon grant of an IBS/television service application, the applicant will be issued a combined Radio Station Construction Permit and License (FCC Form 456-P). While the Commission will limit the use of the authorized facilities to the provision of IBS or television services, carriers may seek additional authorization if they desire to use these facilities as multipurpose earth stations.

[4] *See* cases cited in Satellite Gateway Communications, Inc., Mimeo No. 2696 (released March 4, 1986) and American Telephone and Telegraph Co., Mimeo No. 3327 (released March 25, 1986).

[5] This authorization is not to be construed as permitting the provision of television between earth stations located within the United States.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-87-097

Application for authority to establish channels of communication for the provision of space segment services to all earth stations at various foreign points.

ORDER AND AUTHORIZATION

Adopted: May 15, 1991; Released: May 23, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on March 27, 1987 and amended on June 30, 1987 by Communications Satellite Corporation (Comsat), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide space segment services between the United States, on the one hand, and all earth stations, both existing and those to be constructed in the future, located in the countries listed in the Appendix hereto, via INTELSAT Atlantic and Pacific Ocean Region satellites. The application was placed on public notice on April 8, 1987. No comments were received.

2. Comsat states that it has previously requested authority on a point-by-point or earth station-by-earth station basis. Comsat notes that, under the existing procedure, in the event of an emergency requiring use of a transportable earth station, it must request authority to communicate with the new location even if it already has authority to communicate with another earth station in the same country. It asserts that, with the proliferation of earth stations of smaller size and transportablity, the existing procedure has proven cumbersome.

3. We find that the public interest will be served by authorizing Comsat to communicate with earth stations in other countries participating in the INTELSAT system on a country-by-country basis. The current earth station-by-earth station authorization procedure was instituted at a time when each country had relatively few earth stations with large antennas. Technological advances have reduced the size and cost of earth stations and led to a proliferation of earth stations, including the wide spead use of transportable earth stations. These factors have made the existing procedure of authorizing Comsat to communicate with earth stations in other countries on an earth station-by-earth station basis increasingly burdensome for Comsat and the Commission. We find that our regulatory responsibilities can be adequately satisfied by authorizing Comsat to communicate with earth stations on a country-by-country basis.

4. However, Comsat includes the United States and a number of points in the non-contiguous United States among the countries for which it seeks blanket authority to communicate with all earth stations. There are a number of applications currently pending in which Comsat seeks authority to use INTELSAT space segment capacity to provide service between points on the United States mainland and between the United States mainland and points in the non-contiguous United States.[1] These applications are contested. Therefore, we shall deny the portion of Comsat's instant application requesting blanket authority to provide service between earth stations on the United States mainland and between the mainland and points in the non-contiguous United States. Therefore, we shall delete the United States and the points in the non-contiguous United States from the list of countries to which we will grant Comsat blanket authority to serve all earth stations. We will continue to require Comsat to file on an earth station-by-earth station basis for authority to provide service between earth stations located on the United States and points in the non-contiguous United States.

5. Accordingly, IT IS ORDERED that Application File No. I-T-C-87-097 IS GRANTED IN PART, and Comsat is authorized to establish channels of communication for the provision of authorized services between the United States, on the one hand, and all earth station in the countries listed in the Appendix hereto, via INTELSAT Atlantic and Pacific Ocean Region satellites.

6. Comsat's request for blanket authority to establish channels of communications for the provision of authorized services between earth stations on the United States mainland and between the United States mainland and points in the non-contiguous United States IS DENIED.

7. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *See* applications File Nos. I-T-C-88-162, I-T-C-88-025, I-T-C-88-025-1, I-T-C-88-027 and I-T-C-88-027-1.

APPENDIX

POINTS OF COMMUNICATION

Afghanistan
Albania
Algeria

Angola
Antigua
Argentina
Aruba
Ascension Island
Australia
Austria
Azores
Bahamas
Bahrain
Bangladesh
Barbados
Belgium
Belize
Benin
Bermuda
Bolivia
Botswana
Brazil
Brunei Darussalam
Bulgaria
Burkina Faso
Burma
Burundi
Cameroon
Canada
Canary Islands
Cape Verde
Cayman Islands
Central African Rep.
Chad
Chile
China, Mainland
China, Taiwan
Christmas Island
Colombia
Comoros
Congo
Cook Islands
Costa Rica
Cote d'Ivoire
Curacao
Cyprus
Czechoslovakia
Denmark
Diego Garcia
Djibouti
Dominican Republic
Ebeye
Ecuador
Egypt
El Salvador
Equatorial Guinea
Ethiopia
Falkland Islands
Fiji
Finland
France
French Guiana
French Martinique
French New Caledonia
French Polynesia
Gabon
Gambia
German Dem. Rep.
Germany (Fed.Rep of)
Ghana
Gibraltar
Greece
Grenada
Guatemala
Guinea
Guinea-Bissau

Guyana
Haiti

Honduras
Hong Kong
Hungary
Iceland
India
Indonesia
Iran (Islamic Republic of)
Iraq
Ireland
Israel
Italy
Jamaica
Japan
Jordan
Kenya
Kiribati
Korea (Rep. of)
Kosrae
Kuwait
Lao P.D.R.
Lebanon
Lesotho
Liberia

POINTS OF COMMUNICATIONS

Liechtenstein
Luxembourg
Macao
Madagascar
Majuro
Malagasy Rep.
Malawi
Malaysia
Maldives
Mali
Malta
Mariana Islands
Mauritania
Mauritius
Mexico
Monaco
Mongolia
Morocco
Mozambique
Namibia
Nauru
Nepal
Netherlands
Netherlands Antilles
New Guinea
New Zealand
Niger
Nigeria
Norway
Oman
Pakistan
Palau
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Poland
Ponape
Portugal
Qatar
Romania
Rwanda
Saipan
San Marino
Sao Tome & Principe
Saudi Arabia
Senegal
Seychelles
Sierra Leone
Singapore
Solomon Islands
Somalia
South Africa
Spain
Sri Lanka
St. Lucia
St. Vincent and the Grenadines
Sudan
Suriname
Swaziland
Sweden
Switzerland
Syria
Tanzania
Thailand
Togo
Tonga
Trinidad and Tobago
Truk
Tunisia
Turkey
Turks/Caicos Islands
Uganda
United Arab Emirates
United Kingdom
Uruguay
USSR
Vanuatu
Vatican
Venezuela
Western Samoa
Yap
Yemen (A.R.)
Yeman (P.D.R. of)
Yugoslavia
Zaire
Zambia
Zimbabwe

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-338

In re Applications of

KENNELWOOD BROADCASTING COMPANY, INC.	File No. BPH-870629MU
EXCELSIOR COMMUNICATIONS, INC.	File No. BPH-870603NA
CHASE COMMUNICATIONS, INC.	File No. BPH-870630NB

For Construction Permit for
New FM Station, Channel 233A,
Waco, Texas

MEMORANDUM OPINION AND ORDER

Adopted: May 15, 1991; Released: May 28, 1991

By the Review Board: MARINO (Chairman), and ESBENSEN. Board Member BLUMENTHAL concurring in result.

1. By *Decision*, 6 FCC Rcd 1350 (Rev. Bd. 1991), we affirmed the *Initial Decision*, 5 FCC Rcd 6657 (1990) (I.D.), of Administrative Law Judge Joseph Chachkin (ALJ), granting the application of Kennelwood Broadcasting Company, Inc. (KBC) for a new FM broadcast station at Waco, Texas. In so doing, we also upheld the ALJ's denial of the applications of Chase Communications, Inc. (Chase) and Excelsior Communications, Inc. (Excelsior). The Board now has before it petitions for reconsideration of our *Decision*, filed April 5, 1991, by Chase and Excelsior, respectively. KBC filed an opposition to Chase's petition and comments to the Excelsior petition. For the reasons set forth below, we deny both petitions for reconsideration.

CHASE PETITION

2. The Board's grant of KBC's application was predicated on our determination, under the standard comparative issue, that KBC was entitled to 100% full-time quantitative integration credit. 6 FCC Rcd at 1350-1352. It thus became unnecessary to there reach other exceptions respecting Chase's application, because even with Chase receiving full quantitative integration credit, it could not prevail in light of KBC's qualitative enhancements. *See id.*, at 1353. Chase now urges the Board to reconsider KBC's quantitative integration credit, claiming that the Board shifted the burden of proof to KBC's opponents; failed to consider all relevant evidence; and, relying upon *Julia S. Zozaya*, 5 FCC Rcd 856, 857 (Rev. Bd. 1990) (subsequent history omitted) and *Victorson Group, Inc.*, 6 FCC Rcd 1697 (Rev. Bd. 1991), departed from Commission precedent denying integration credit to an applicant that fails to present persuasive evidence as to how its principals' proposed broadcast and other business interests would be effectuated.

3. Chase's arguments are without merit. The Board carefully reviewed the entire record, *see Decision*, 6 FCC Rcd at 1352, para. 11, and concluded that KBC had demonstrated that it could effectuate its integration proposal. *See Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6317 (Rev. Bd. 1990) (applicant bears the burden of proof on all facets of its comparative case). Indeed, the alleged "conflicts" made by the KBC principals in their written integration statements, direct case exhibits, and oral testimony (which Chase claims were "overlooked"), were, in fact, carefully scrutinized and subsequently rejected. 6 FCC Rcd at 1351, para. 7. Reconsideration will not be granted merely for the purpose of rehashing arguments previously made and considered. *WWIZ, Inc.*, 37 FCC 685, 686 (1964) (subsequent history omitted).

4. Further, neither *Zozaya* nor *Victorson* mandate a revision of our *Decision*. In *Zozaya*, the Board rejected a claim for full integration credit where the purported integrated principal also proposed to work 30 hours per week at a station located 135 miles away (and also participated 25 hours per week in civic activities). 5 FCC Rcd at 857-858. The Commission upheld the Board's determination, finding that the applicant did not have a clearly defined plan capable of effectuation. 5 FCC Rcd 6607. By way of contrast here, the KBC principals propose to devote no more than 3 hours each per week, overseeing the operations of their other local business. Thus, *Zozaya* is inapposite. Similarly, in *Victorson*, integration credit was denied where a proposed principal's testimony reflected ambivalence in extricating himself from his outside filmmaking business and in promising to continue as an integrated principal should his filmmaking business be successful. No similar circumstances are present here.

EXCELSIOR PETITION

5. The I.D. rejected Excelsior's claim for 75% full-time and 25% "substantial time" (*i.e.*, 30 hours per week) quantitative integration credit, because three of the four Excelsior principals (Arthur King, Alvin Pollard, Sr., and Eric Hooker, each owning a 25% interest) had conflicting interests that precluded them from effectuating their broadcast commitments. 5 FCC Rcd at 6663-6664. Thus, Excelsior was awarded only 25% quantitative integration credit for Marilyn Marshall's proposal to serve as the station's general manager (in light of her testimony that she would resign from her current full-time job in the event Excelsior's application was granted, and move to Waco). 5 FCC Rcd at 6661, 6663. The Board did not reach Excelsior's exceptions to the ALJ's failure to credit Excelsior's entire integration proposal, stating that Excelsior's concession in its exceptions that it was seeking only 75% full-time credit was dispositive, and noting that the Commission had declared in *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 (1989) (subsequent history omitted), that a quantitative differential of 12.5% integration credit cannot be overcome by the qualitative attributes of the participating owners. 6 FCC Rcd at 1353.

6. Excelsior argues in its petition, however, that, under a formula analogous to the Hirschman-Herfindahl Index (HHI), adopted by the Commission in *Omaha TV 15, Inc.*, 4 FCC Rcd 730, 733 (1988) (utilized to factor into the integration calculus proposals that are less than full-time), it is entitled to an "equivalency" of 89%[1] (not 75%) quantitative integration credit, well within the 12.5% quantitative differential necessary for a comparison of qualitative enhancements.

7. Excelsior initially excepts to the ALJ's failure to credit the proposal of its President, Arthur King, as full-time station manager and program director. King is currently employed at Baylor University as a full-time, tenured professor, and will continue to serve in that position even if Excelsior's application is granted. I.D., 5 FCC Rcd at 6659. The ALJ concluded that King's proposal was not entitled to credit, because the hours King proposed to work at the station were: (1) scattered over evenings and weekends (citing *V. O. B. Incorporated*, 5 FCC Rcd 5872, 5874-5875 (Rev. Bd. 1990)); (2) in a state of flux, dependent on the school's schedule; and, (3) when adjoined to King's faculty schedule, King would be devoting in excess of 70 hours per week to broadcast and other activities, a demarcation exceeding the outer limits of credibility. *See Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181, 189 (Rev. Bd. 1986) (subsequent history omitted).

8. Excelsior disputes the ALJ's factual finding that King's aggregate work schedule exceeds 70 hours per week. It argues that King's position at Baylor requires him to work only 21 to 24 hours weekly, and, when added to his station commitment of 40 hours, equals a maximum of 61 to 64 hours, leaving him with a 5 to 8 hour "safety net." Excelsior further disputes that King's hours are scattered, arguing he will teach classes either on a fixed schedule of Monday-Wednesday-Friday or Tuesday-Thursday, and be present at the station on his off-days.

9. Although Excelsior appears to be contending that its claimed integration proposal should be credited, *vel non*, according to whether King's aggregate work schedule is above or below 70 hours, that factor, by itself, is not dispositive. Rather, an applicant is entitled to quantitative integration credit only where it sets forth a specific meaningful integration proposal and there is reasonable assurance that the plan will be carried out. *Royce International Broadcasting*, 5 FCC Rcd 7063 (1990). Credit is disallowed where a principal's outside employment activities cast substantial doubt on whether the proposed integration into station management is likely to be effectuated. *Id.* And, it is only in this vein that a 70-hour work schedule, coupled with other indicia, was initially rejected as unlikely to be effectuated. *Berryville Broadcasting Co.*, 70 FCC 2d 1, 12 (Rev. Bd. 1978). Where the integration proposal conflicts with simultaneous outside commitments, the applicant has an affirmative burden to demonstrate persuasively that it can overcome facially questionable aspects of its integration proposal. *Julia S. Zozaya*, 5 FCC Rcd 6607 (1990); *Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751, 5754 n. 13 (Rev. Bd. 1990). *Swan Broadcasting Limited*, 6 FCC Rcd 17, 18 (Rev. Bd. 1991).

10. Here, Excelsior has not established that King has a clearly defined plan capable of effectuation. Initially, the prototype station schedule envisioned by King is similar to a schedule criticized by the Board in *V. O. B., supra*, 5 FCC Rcd at 5874-5875, where a significant portion of the proposed working hours included evenings and weekends. We noted there that, on balance, such a schedule does not constitute the type of full-time participation contemplated by the Commission in its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965), as warranting substantial weight in the comparative process. 5 FCC Rcd at 5875. Here, as in *V. O. B.*, King would be absent from the station for a significant portion of the time the station's on-air personnel are working, and yet it is those personnel whom King is to supervise. Tr. 224-226.

11. Moreover, contrary to Excelsior's claim (Br. at 9) that King's university requirements are 21 to 24 hours weekly, it appears from his own testimony that he is obligated to the university for, at minimum, 33 hours weekly; that is, he has a teaching assignment of 9 hours (Tr. 380); spends an hour out of class for each hour in class, *i.e.*, another 9 hours (*id.*); has regularly scheduled office hours equal to the number of teaching hours, *i.e.*, an additional 9 hours (Tr. 380); and also serves as an advisor to the Office of the University President (which is contemplated to equal the hours he would expend if he taught another hour class, *i.e.*, 6 additional hours (Tr. 381-383)). Excelsior argues, however, that King utilizes his scheduled office hours for the necessary extra hours of class preparation, but KBC proffered an attachment to King's faculty contract reflecting that the school perceives the scheduled office hours for counselling students, making reports to the university offices, and turning in grade reports in a timely manner. KBC Exh. 4, p. 4, para. 5; Tr. 381-382.

12. In sum, although it appears that King would be able to devote some hours to the station, Commission policy does not accord even part-time credit to proposals where there is no record basis for determining the actual number of hours in question, since the HHI formula requires an exact determination of the hours each principal will devote to station management. *Cuban American Ltd.*, 5 FCC Rcd 3781, 3785 (1990). Thus, Excelsior is not entitled to any quantitative integration for King's integration proposal. *See Swan Broadcasting*, 6 FCC Rcd at 18, and cases cited therein; *see also Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240, 1242 (Rev. Bd. 1987) (Commission will not credit proposals to maintain two full-time jobs) (subsequent history omitted).

13. Excelsior also excepts to the ALJ's failure to credit the substantial-time integration proposal of Alvin Pollard, Sr. to serve as the station's sales manager. Like King, Pollard does not plan to leave his current full-time position as Dean of Technical Education at McLennan Community College, where his work hours are 8:00 a.m. to 5:00 p.m., Monday through Friday. Tr. 440. Pollard claims that he will meet his station commitment by working 7:00 p.m. to 10:00 p.m., Monday through Friday, 8 hours on Saturday, and 7 hours on Sunday. I.D., 5 FCC Rcd 6660. Noting that the sales staff's hours are normal business hours and that Pollard's hours are all evenings and weekends, the ALJ found Pollard's proposal incredible. *Id.*, 5 FCC Rcd at 6664. Excelsior contends, however, that the Commission should defer to Pollard's bu judgment as to his work schedule. It argues that Po 9-to-5 presence at the station is unnecessary since th will be in the field during the day and that he w accessible afterwards, thus requiring them, at times, at the station beyond a normal work-day between p.m. and 10:00 p.m. for sales meetings and trainin sions.

14. Excelsior has not overcome the facially questionable aspects of Pollard's integration proposal. Pollard testified that he contemplates the sales staff will be working at the station during the hours he is working at the college. Tr. 448. Yet, his station role includes "management [and] administration . . . relating to sales advertising time" and "supervision of others who will be selling time on the station, including review of sales efforts." Excelsior Exh. 6. He also claims that he intends to "participate" in sales work himself. I.D., 5 FCC Rcd at 6659. It is highly doubtful that Pollard could effectively carry out either his defined position as sales manager by merely occasionally summoning the sales staff to attend evening sales meetings and training sessions, or his anticipated activites as salesman, notwithstanding that some businesses may be open in the evenings or on weekends. Excelsior's request that we defer to Pollard's business judgment is not apposite here. Pollard's business hours obviously are not based on a rational business judgment, but rather have been chosen because the hours in which one would reasonably anticipate the major business decisions to occur are precisely those same hours in which Pollard must serve as dean of the college. In light of the Commission's admonition in *Cuban American Ltd., supra*, that the HHI formula requires an exact determination of the hours a principal will spend in a managerial-level station position, no credit whatever is warranted for Pollard's proposal.

15. Excelsior's final exception relates to the ALJ's failure to credit the integration proposal of Eric Hooker to serve as the station's full-time business manager and director of public service broadcasting. Hooker currently is employed full-time as a congressional assistant in Waco, and as the senior pastor of a church in Waco that has a membership of 450 persons. I.D., 5 FCC Rcd at 6660. Hooker concedes that he will continue his "pastoral duties," even if Excelsior prevails in this proceeding (but the ALJ found that he would reduce his work as a congressional assistant to 20 hours per week). 5 FCC Rcd at 6663. Hooker's full-time integration proposal was rejected by the ALJ based on Hooker's testimony that he would only work at the station afternoons, evenings, and weekends, and on a finding that his overall work schedule exceeded 70 hours. *Id.* Excelsior contends that the ALJ erred in ignoring Hooker's pledge to "withdraw or if necessary resign" to effectuate his proposal. It adds that Hooker's only definite outside commitment totals the 6.2 hours he spends on his pastorship duties.

16. As with King and Pollard, Excelsior has not demonstrated that Hooker can effectuate a full-time schedule at the proposed station. We have previously held that where a "vocational conflict is apparent on its face, a loose promise to 'diminish' the time devoted to a current occupation [or sell if necessary] is too indefinite a vow to accept as satisfactory." *Stanley Group Broadcasting, Inc.*, 3 FCC Rcd 5017, 5021 (Rev. Bd. 1988) (bracket in original). Here, Hooker qualified his pledge to withdraw or resign by stating that he *would* continue to work a minimum of twenty hours weekly as a congressional assistant. Tr. 571-572, 648-649. Moreover, there is no dispute that Hooker's regularly scheduled pastoral duties include a fluctuating schedule of weddings, funerals, and oversight of activities of the church, which will take additional time from Hooker's proposed full-time station hours. In sum, there is no persuasive basis for concluding that Hooker would be able to effectuate his proposal. And, like King and Pollard, the non-accreditation of his full-time proposal also defeats an award of part-time credit. *Cuban American, supra*. Because Excelsior is entitled to only 25% full-time quantitative integration credit for Marilyn Marshall's proposal, it cannot prevail comparatively over KBC. *See Miracle Strip Communications, Inc.*, 4 FCC Rcd at 5066.

17. ACCORDINGLY, IT IS ORDERED, That the Petitions for Reconsideration filed April 5, 1991 by Chase Communications, Inc., and Excelsior Communications, Inc., respectively, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] The formula is: $(100 \times (\text{hours per week}/40))^2 \times$ percentage of ownership. *Omaha TV 15, Inc.*, 4 FCC Rcd at 734. Applying the formula to the figures here: $(100 \times (30/40))^2 \times .25 = 1406$ for Pollard's proposal, and $(100 \times (40/40))^2 \times .25 = 2500$ for each of the three other principals; or a total of $7500 + 1406 = 8906$ (or 89%).

STATEMENT OF BOARD MEMBER BLUMENTHAL CONCURRING IN RESULT

Much as I did upon a plea for reconsideration in *Central Texas Broadcasting Co.*, 92 FCC 2d 914, 918 (Rev. Bd. 1982) (concurring statement), and, as there, for procedural reasons only, *see* 47 CFR § 1.106(b)(2), I concur in the majority's refusal to reconsider the substantive arguments repeated here by Chase Communications, Inc.

In our subject *Decision*, I had concurred, with very strong reservations, in the majority's award of a total, full-time ownership/management integration credit to each of the principals of Kennelwood Broadcasting Company, *see* 6 FCC Rcd at 1364 (concurring statement), who proposed also to retain and operate a recently launched retail and service establishment. The reflexive response, naturally: "*Who's watching the store*?"

The reservations there expressed are not retracted; and nothing said in the majority's reaffirmation, *ante* paras. 2-4, induces any greater assurance in the soundness of its previous disposition. Its unequivocal award of full-time integration credit to both the Kennelwood partners seems, as did a Board majority's in *Central Texas*, a manifestation of hope over hard-headed experience, *see id.*, 6 FCC Rcd at 1354-55 n. 1, and regrettably bereft of the keen sense of skepticism exemplified by Board Member Esbensen in *Anchor Broadcasting Limited Partnership*, 5 FCC Rcd 2432, 2445 (Rev. Bd. 1990) (separate statement) (subsequent history omitted).

As to this particular facet of the majority's *Decision*, and in the maxim of the common law, *quod ab initio non valet in tractu temporis non convalescet.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

David A. Davila,
Nicasio O. Flores
and Maria Norma Flores
Transferors

and File No. BTCCT-890929KK

Telemundo Group, Inc.
Transferee

For Transfer of Control of
Nueva Vista Productions, Inc. [1]
Permittee of Station KVDA(TV),
San Antonio, Texas

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 1991; Released: May 23, 1991

By the Commission:

1. The Commission has before it for consideration: (1) an application for review, filed by Edward L. Gonzalez ("Gonzalez"), of a *Memorandum Opinion and Order*, 5 FCC Rcd 5222 (Video Services 1990), in which the staff granted an application to transfer control of Nueva Vista Productions, Inc. ("Nueva Vista"), permittee of KVDA(TV), San Antonio, Texas, from David A. Davila, Nicasio O. Flores and Maria Norma Flores to Telemundo Group, Inc. ("Telemundo"), and denied a petition to deny filed by Gonzalez; and (2) oppositions filed by Telemundo and Nueva Vista. [2]

BACKGROUND

2. In 1987, Nueva Vista was one of five competing applicants for a construction permit to operate a commercial television station on Channel 60 (now Station KVDA(TV)) in San Antonio, Texas. Nueva Vista's application was granted on August 31, 1988 after the parties reached a settlement, on July 1, 1988. Gonzalez' petition to deny raised issues with respect to allegedly undisclosed understandings or agreements executed by Nueva Vista and Telemundo between March 1988 and November 1988 and an alleged unauthorized transfer of control from Nueva Vista to Telemundo. Specifically, Gonzalez argued, among other things, that: (1) the applicants failed to disclose adequately to the Commission a series of understandings, including letters of intent and agreements relating to ownership or future ownership rights, [3] in violation of Sections 1.65 and/or 73.3613 of the Commission's Rules; [4] and (2) that Telemundo exercised control of Nueva Vista without Commission authorization.

3. The staff initially noted in the *Memorandum Opinion and Order* that the FCC Form 301 in use at the time Nueva Vista filed its construction permit application required the disclosure of, among other things, "understandings" related to ownership or future ownership rights. 5 FCC Rcd at 5225, para. 26. The staff concluded that the March LOI and June LOI contained the type of "understandings" that substantially changed information in Nueva Vista's construction permit application, which would generally invoke the amendment requirement of Section 1.65(a). However, the staff found that Nueva Vista was required to disclose only the June LOI since the March LOI had expired before the 30-day reporting period set forth in Section 1.65(a). *Id.* at para. 26. The staff also inferred that Nueva Vista had disclosed

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[1] By amendment filed September 10, 1990, the licensee notified us that the corporation formerly known as "Nueva Vista Productions, Inc. " had changed its name to "Telemundo of San Antonio, Inc."

[2] In its opposition to Gonzalez' application for review, Telemundo states that Gonzalez lacks standing pursuant to Section 309(d)(1) of the Act. Because of the significant public interest issues raised in Gonzalez' pleading, we believe the staff appropriately considered his allegations. Thus, we need not address Telemundo's assertions regarding standing.

[3] These included: (1) a March 28, 1988 Letter of Intent ("March LOI") between Telemundo and Nueva Vista expressing the parties intent that Telemundo would provide funding to Nueva Vista for the construction and initial operation of Channel 60; (2) a June 8, 1988 Letter of Intent ("June LOI"), expressing the parties intent that SAT Corp., a subsidiary of Telemundo, would provide funding to Nueva Vista to be used to settle the Channel 60 comparative proceeding with all of the remaining competing applicants except San Antonio Broadcasting, Inc. ("SABI"), which had not agreed at this stage to settle with Nueva Vista; (3) a July 19, 1988 agreement ("Settlement Loan Agreement"), essentially executing the intent of the June LOI; and (4) an October 21, 1988 agreement ("Construction Loan Agreement"), which included the same basic provisions contained in the March LOI. All of the above documents included a provision that the loans were to be secured by a lien on Nueva Vista's assets and included a pledge of Nueva Vista's stock. In addition, the March LOI and the October Construction Loan Agreement contained a put/call option. The June LOI and July Settlement Loan Agreement did not contain put/call options, but only a right of first refusal. The March LOI was conditioned upon the filing of an executed settlement agreement within 15 days of the execution of each letter of intent.

[4] Section 1.65(a) of the Rules provides in pertinent part that "whenever the information furnished in the pending application [or in Commission proceedings involving a pending application] is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend... his application so as to furnish such additional or corrected information as may be appropriate. "

Section 73.3613(b)(3)(iii) provides in pertinent part that a licensee or permittee of a commerical television station file with the FCC within 30 days of execution there "[c]ontracts, instruments or documents relating to the p or future ownership or control of the licenseee or permit to the licensee's or permittee's stock, rights or interests th or relating to changes in such ownership or control...."

the existence of stock pledge provisions in its construction permit application (by answering Question 10 of the FCC Form 301 in the affirmative) and therefore found that Nueva Vista did not need to disclose the July Settlement Loan Agreement, containing those provisions, in a 1.65 amendment. *Id.* at para. 26 n. 6. Nor did Section 73.3613 of the Rules require disclosure of the July agreement since Nueva Vista was not a permittee or licensee at the time it was executed and the rule by its terms applies only to permittees and licensees. *Id.* Further, the staff found that Nueva Vista violated Section 73.3613 of the Rules for failing to submit to the Commission the October Construction Loan Agreement within 30 days of its execution. The staff concluded that while Nueva Vista technically violated the disclosure and filing rules by failing to report the June LOI and to submit the October Construction Loan Agreement, sanctions were not warranted. As discussed more fully below, the staff also found that there was no substantial and material question of fact as to whether Telemundo controlled KVDA(TV) without prior Commission approval. *Id.* at para. 28.

PLEADINGS

4. In his application for review, Gonzalez disputes the staff's finding that Nueva Vista's failure to comply with the Commission's disclosure rules was not willful or intentional, so as to warrant sanctions. In this regard, Gonzalez states that the willfulness of Nueva Vista's noncompliance is evidenced by Gonzalez' sworn testimony, indicating that in 1988, Nueva Vista's attorney explained to Gonzalez the intention of using a "shell" subsidiary of Telemundo, SAT Corp., in negotiations with Nueva Vista and SABI, a competing comparative applicant, in order to keep SABI from knowing of Telemundo's loans to Nueva Vista. Moreover, Gonzalez states that the Commission does not require "willfulness" to be proven where "a pattern" of disclosure violations is established, which Gonzalez asserts exists here given the staff's finding that Nueva Vista violated the disclosure rules with regard to the June LOI and October Construction Loan Agreement between Telemundo and Nueva Vista. He states that this "pattern, " in conjunction with Telemundo's use of SAT Corp. in negotiations, raises a question regarding Nueva Vista's intent to withhold information from the Commission. Gonzalez further argues that the staff erred in concluding that disclosure of the July Construction Loan Agreement was not required and that nondisclosure of the March LOI was excusable because it expired before the 30-day reporting period set forth in Section 1.65(a) of the Rules. Gonzalez also asserts that the staff erred by failing to address his allegation, raised in supplemental pleadings to the petition to deny, that Nueva Vista did not disclose an application, filed by its President, David Davila, and later granted by the Commission, for an LPTV station in Corpus Christi, Texas. Gonzalez states that there was evidence in the applicants' pleadings that a "tentative understanding" regarding a stock option between Telemundo and Nueva Vista was reached on January 11, 1988.

5. Next, Gonzalez reiterates his previous allegations with respect to unauthorized control of Station KVDA(TV) by Telemundo. First, he states that his own employment contract with Nueva Vista was negotiated by a Telemundo official, who was a signatory to that agreement. Second, he states that KVDA(TV)'s general manager and other key employees were required to interview with Telemundo officials in New York prior to being employed. Third, Gonzalez states that a March 1, 1988 letter from Nueva Vista's own lawyer to Gonzalez indicates that Davila, Nueva Vista's President and majority stockholder, would function only as a figurehead until the FCC approved the transfer of control application. Gonzalez argues that these facts, in addition to the fact that Telemundo was providing construction and settlement funds to Nueva Vista, evidences Telemundo's premature control over KVDA(TV).

6. In response to Gonzalez' nondisclosure arguments, Nueva Vista and Telemundo respond that Nueva Vista substantially complied with FCC reporting requirements before and after it became a permittee for Station KVDA(TV). With respect to the March LOI, they argue that Commission precedent clearly establishes that the "as promptly as possible" requirement of Section 1.65(a) of the Rules is satisfied if the 30-day deadline is met, except where "time is of the essence, " which they assert was not the case here. Thus, they conclude that because the March LOI expired before the 30-day deadline, the staff was correct in finding that Nueva Vista was excused from reporting it. Nueva Vista and Telemundo also assert that the staff correctly found that the July Settlement Loan Agreement need not be filed. They state that Nueva Vista disclosed the existence of the agreement once it became a permittee. With respect to Nueva Vista's conceded failure to submit timely the October Construction Loan Agreement, Nueva Vista and Telemundo reiterate their argument made to the staff that the agreement was filed only ten days late, before the construction permit was issued and before call letters were assigned. They contend that this constitutes substantial compliance with Section 73.3613 of the Rules. They further assert that because all of the agreements were voluntarily disclosed to the Commission, either in Nueva Vista's first ownership report or, in the case of the October Construction Loan Agreement, through direct filings, there is no evidence of willful violation of the Commission's disclosure rules.

7. With respect to an unauthorized transfer of control, Nueva Vista and Telemundo respond that Gonzalez is merely reiterating previous arguments that are based largely on uncorroborated misinformation and mischaracterizations of personnel-related incidents. First, they note that while Len Foreman, Telemundo's representative, facilitated negotiation of Gonzalez' contract, Nueva Vista "controlled" approval of the contract as negotiated. Second, they note that while Gonzalez argues that Telemundo interviewed four key employees, he does not dispute that Davila was responsible for selecting and hiring the station employees, as concluded in the staff's decision. Finally, Nueva Vista and Telemundo state that the March 1, 1988 letter from Nueva Vista's own lawyer to Gonzalez does not suggest that Davila would act merely as a figurehead until Commission approval of the transfer of control application, contrary to Gonzalez' allegation. Rather, the letter indicates that Davila would be a "liaison" with Telemundo should the parties enter into a loan arrangement.

DISCUSSION

Disclosure of Documents

8. First, the staff correctly found that Nueva Vista did not have to report the existence of the March LOI. While the March LOI contained a put/call option, which is an understanding related to future ownership rights, the letter expired by its own terms before the 30-day reporting period under Section 1.65 of the Rules. We do not believe applicants must report agreements that expire before the end of the 30-day period under Section 1.65 of the Rules. Moreover, the staff correctly concluded that it was unnecessary for Nueva Vista to report the July Settlement Loan Agreement in a 1.65 amendment. While Question 10 of the construction permit application (FCC Form 301) at that time required the applicant to certify that certain provisions were included in any "documents, instruments, agreements or understandings for the pledge of stock of a corporate applicant as security for loans or contractual performance, " the question does not request that the documents themselves be reported or submitted if the question is answered in the affirmative. An affirmative response to Question 10 also served to put the Commission on notice of the existence of such documents or understandings with respect to which the Commission could inquire further if it wished to do so. [5]

9. Further, while we agree with the staff's conclusion that stock pledge provisions may relate to ownership or future ownership rights, we find that generally, stock pledges as security for debt do not rise to the level of investment-like instruments, which Question 9 of the FCC Form 301 required to be reported. The types of investment-like documents required to be reported pursuant to Question 9 included non-voting stock interests, beneficial stock ownership interests, options, warrants and debentures. Thus, we find that the June LOI should have been accorded the same treatment as the July Settlement Loan Agreement, which contained the same stock pledge provisions, and need not have been specifically reported. We wish to make clear in general, however, that letters of intent may be considered "understandings" that must be disclosed under Question 9 if they contain the types of provisions related to ownership or future ownership rights contemplated by Question 9 and are sufficiently specific as to constitute more than preliminary negotiations.

10. We also affirm the staff's conclusion that Nueva Vista's failure to disclose the October Construction Loan Agreement in a timely manner was a minor violation of Commission rules and was not intentional. In fact, its disclosure was voluntary and only 10 days after the 30-day period set forth in Section 73.3613 of the Rules. *Memorandum Opinion and Order*, 5 FCC Rcd at para. 26. Thus, without more, we are unable to conclude that the late disclosure is a serious violation raising substantial and material questions of fact regarding Nueva Vista's qualifications or candor. [6]

11. Given the circumstances noted above, no "pattern" of nondisclosure, as suggested by Gonzalez, exists. We affirm the staff's conclusion that sanctions are not warranted and find that there is no substantial and material question of fact concerning compliance with our disclosure or filing rules that would require resolution at a hearing. [7] *Control of Station KVDA (TV)*

12. Gonzalez has raised no new arguments regarding Telemundo's alleged premature control of Station KVDA(TV). We believe that the staff fully and correctly addressed all of the allegations raised by Gonzalez. Specifically, the staff noted that regardless of whether Telemundo met with any prospective KVDA(TV) employees or not, including the general manager, key employees and Gonzalez, the record demonstrated that the ultimate authority to hire them resided in Davila, the president and 51% shareholder of Nueva Vista. *Id.* at para. 29. We have held that even if the day-to-day operations of a station are conducted by an agent or employee, if guided by policies set by the licensee or permittee, such actions are not inconsistent with the Communications Act. *Alabama Educational Television Commission*, 33 FCC 2d 495,508 (1972). In sum, the record establishes that Davila, of Nueva Vista, controlled the day-to-day operations at the station and made all final decisions. *Memorandum Opinion and Order, supra* at para. 31.

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[5] As the staff also noted correctly, Nueva Vista was not required to submit the July Settlement Loan Agreement pursuant to Section 73.3613 of the Rules, because Nueva Vista was not yet a permittee when that agreement was executed, nor was it the kind of agreement that was required to be reported pursuant to Section 73.3613 of the Rules.

[6] Gonzalez states that he was told by Nueva Vista's attorney that Telemundo's subsidiary was used to keep Nueva Vista's opponents in the comparative hearing from discovering that Telemundo was financing the settlement. Even if this statement were true, we are similarly unpersuaded that Telemundo's actions in this regard suggest any intent on the part of Nueva Vista to deceive the Commission. As noted correctly by the staff, Nueva Vista was not required to disclose the principal of the subsidiary under these circumstances. *Id.* at n. 7.

[7] Gonzalez also argues that Nueva Vista failed to disclose two other transactions. First, he asserts that Nueva Vista should have earlier disclosed the fact that Davila, its President, filed an application for a LPTV station in Corpus Christi. While technically this information should have been submitted to update the construction permit application, we can discern no motive to deceive the Commission by its untimely disclosure, and we find that it raises no substantial and material questions of fact regarding Nueva Vista's qualifications. The Commission already had this information on file. Although the grant of such an application would be weighed in a comparative balance in a close case, the pendency of an application would not. In this case, the LPTV application was granted on May 1, 1990, after the grant of Nueva Vista's construction permit. Moreover, the multiple ownership rules do not preclude a full-service station's overlap with a commonly owned LPTV station. We also note that it does not necessarily follow, as suggested by Gonzalez, that Davila's ultimate operation of an LPTV station in Corpus Christi would require that he be any less attentive to the operation of Station KVDA(TV).

Second, Gonzalez references an understanding between Telemundo and Nueva Vista that took place on January 11, 1988, suggesting that it too should have been disclosed. However, there is nothing in the record to suggest that this understanding, characterized by Gonzalez himself as "tentative, " constituted any more than a preliminary negotiation, which, as noted by the staff, does not require disclosure. *Memorandum Opinion and Order, supra* at para. 26.

13. We further disagree with Gonzalez' assertion that the March 1, 1988 letter from Nueva Vista's attorney, indicating that Davila would have to be "a liaison," is tantamount to an acknowledgement that Davila was merely a "figurehead" and that Telemundo would take care of everything, as suggested by Gonzalez. The terms have two entirely different meanings. Further, it appears that the letter was written significantly before construction actually started, and thus before the range of Davila's duties could have been known to Nueva Vista's attorney. Moreover, the record indicates that Davila, the majority shareholder and an employee of Nueva Vista, controlled the day-to-day operations at the station and made all final decisions, as noted in the staff's decision. Thus, we affirm the staff's conclusions that there was no substantial and material question of fact as to whether Telemundo controlled KVDA(TV) without Commission authority.

14. Based on the foregoing, we find that the petitioner has failed to demonstrate that the staff erred in granting the application for consent to transfer control of Nueva Vista Productions, Inc. permittee of Station KVDA(TV), San Antonio, Texas. Accordingly, IT IS ORDERED, That the action of the staff, granting the referenced transfer of control application and denying the Gonzalez petition to deny, IS AFFIRMED, and Gonzalez's application for review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-263

In the Matter of

Amendment of Section 73.3525
of the Commission's Rules Regarding
Settlement Agreements Among
Applicants for Construction Permits

MEMORANDUM OPINION AND ORDER

Adopted: May 9, 1991; Released: May 15, 1991

By the Commission: Commissioner Barrett issuing a separate statement.

1. By this *Memorandum Opinion and Order*, the Commission clarifies and modifies the rules adopted in the *Report and Order* in this proceeding, reflecting our effort to eliminate abuse of Commission processes by limiting the payments that can be made to settle cases involving competing applications for construction permits for new broadcast stations or modifications to facilities of existing stations. [1] Petitions for reconsideration of that action were filed by the Federal Communications Bar Association (FCBA); Hampton Broadcasting Limited Partnership, *et al.* (Hampton); Melanie Bruton, *et al.* (Bruton); and the National Association for the Advancement of Colored People, *et al.* (NAACP). No oppositions to the petitions were filed.

The FCBA and Hampton Petitions

Settlement limits

2. The FCBA and Hampton request that we reconsider that part of our *Report and Order* that eliminates settlement payments after the start of the trial. Both petitioners argue that this prohibition can affect only legitimate applicants; sham applicants will be deterred by the provision limiting pre-hearing settlements to expenses incurred. Moreover, petitioners argue, the impact of this prohibition will be harshest for less well-financed applicants. These applicants simply cannot afford to risk losing an opportunity to settle for their expenses. They will be forced to accept whatever settlement arises during the "grace period" before our prohibition takes effect.

3. According to the FCBA, the prohibition removes the incentive to settle close cases, especially at the appeals stage. The FCBA states that most legal fees are incurred prior to and during the trial. It argues that a party who has passed the settlement payment cutoff and suffered an adverse initial decision will be more inclined to spend the relatively small additional amount necessary to prosecute the case through appeals than dismiss and lose the entire investment.

4. Finally, the FCBA challenges the premise on which the prohibition against settlement payments after the trial commences rests: that competing applicants can assess their likelihood of success prior to the start of the hearing. The FCBA points out that an applicant's circumstances and Commission policy can change during the trial. Evidentiary rulings and oral testimony can affect the applicants' relative standings. None of these can be assessed before the hearing begins.

5. On reconsideration, we are persuaded that an across-the-board limitation on settlement payments to expenses is sufficient to deter speculative applications because it forecloses applicants from making a profit on settlements.[2] While an absolute bar on settlement payments after the start of the trial would no doubt encourage earlier settlements, we are concerned that this may prevent *bona fide* applicants with limited financial resources from prosecuting their applications past the start of the trial. Moreover, by making it impossible for parties to fully recoup their expenses at later hearing stages, such a policy would discourage those that had decided against early settlement from settling at some later point. We thus conclude that, in the context of comparative proceedings involving applicants for new stations, [3] the benefit of prohibiting settlement payments after the trial starts, *i.e.*, encouraging earlier settlements, is insufficient to outweigh the possible adverse consequences of such a prohibition.

Applicability to pending applications

6. Hampton asks the Commission not to apply the settlement rules to pending applications even if the restriction on payments after the trial commences is eliminated. Hampton argues that applying the restriction limit to applications already on file most harshly affects applicants who have done the most to demonstrate good faith: those who have prosecuted their applications throughout costly and lengthy hearings and appeals processes. These applicants will be forced to accept whatever settlement arises during the grace period before the new limits become effective or be precluded from ever recovering any of the expenses they incurred during the good faith prosecution of their applications. Hampton suggests that such a harsh policy creates a compulsion on

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[1] 56 Fed. Reg. 373 (January 4, 1991); 6 FCC Rcd 85 (1990). Consistent with Section 74.780 of our rules, the rule changes adopted herein also apply to applicants for TV translators, low power, and booster stations. *See* 47 CFR § 74.780. We are also making an editorial change to Section 74.780 to conform its cross-reference to the subsections in Section 73.3525 to current subsection designations in Section 73.3525.

[2] Our decision renders moot the FCBA's request for clarification on what the "first day of trial" means.

[3] *But see Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780 (1989), *recon. granted in part on other grounds*, 5 FCC Rcd 3902 (1990), *further recon. pending*.

applicants to settle in violation of the full hearing requirement of Section 309(e) of the Communications Act [4] and *Ashbacker Radio Corp. v. FCC*. [5]

7. Whatever merit these arguments have in the context of a posthearing prohibition on all settlement payments, we believe that they are now inapposite. In light of the modification of our settlement policy, goodfaith applicants will be able to recoup their expenses at any point in the comparative new proceeding. No applicant will be compelled to accept a settlement simply to avoid a payment cutoff.

8. As we noted in the *Report and Order*, expeditious resolution of proceedings to facilitate the offering of new service to the public is a primary concern in comparative new cases. Moreover, since comparative new applicants can settle for expenses at any point in the proceeding, we believe it is unnecessary to exempt pending post-designation applicants from application of the revised rule. However, we must delay the effective date of the new rules beyond the normal 30 days required by the Administrative Procedure Act in order to obtain the approval of the Office of Management and Budget for the information collection requirements we have adopted in this proceeding. [6] The effect of this delay is to provide a brief period for applicants to settle under existing rules before the new rules become effective.[7] Accordingly, as of the effective date of the new rules, August 1, 1991, the settlement payment limitations will apply to all applications, including those that are pending at that point.

Mergers

9. The FCBA requests clarification of the new rule to indicate that it is not intended to apply to settlements by merger of applicants. We agree that our rules limiting settlement payments to legitimate expenses should not be applied in such a manner as to preclude or unduly hinder legitimate merger transactions involving competing applicants. A *bona fide* merger of business entities represents a consensual allocation of economic risks and rewards among the merging parties which presumably reflects the assets brought to the joint undertaking by the various participants. Such arrangements are ordinarily broader in scope, in terms of both their economic motivation and objectives, than a simple buyout of a competing applicant. We do not wish to impede these broader purposes and the benefits that they may engender in rendering broadcast service to the public in more efficient and effective ways. Accordingly, we shall not apply the settlement limitations adopted in this proceeding to settlement arrangements that are part of a *bona fide* merger of the settling applicants business interests.

10. We are, of course, concerned that this merger exception to the settlement limitations not be susceptible to abuse by those who merely wish to evade the payment restrictions applicable to non-merger settlements. We shall, therefore, examine closely any proposal to settle among competing applicants by merger of the applicants to ensure that the merger is *bona fide*. In this connection, we shall rely on the broad principles of case-by-case analysis outlined in *Venton Corporation*, 90 FCC 2d 307 (1982). [8] Additionally, we intend to follow certain specific guidelines in reviewing merger proposals for legitimacy. First, we will examine with a heightened level of scrutiny any merger proposal where the dismissing applicant receives cash, either up-front or on a deferred basis, and the payment is guaranteed regardless of the outcome of the business venture. We will accord similar scrutiny to any merger proposal that provides for cash or similar liquid asset payments to the dismissing applicant in excess of its out-of-pocket expenses. Finally, out of concern for the potential abuse of our processes that the merger exception may engender, we will be inclined to disallow merger settlements that present a close question. To aid the Commission in its scrutiny of merger settlement agreements, we will require applicants to submit a full explanation and justification of the parties' exchange of consideration in addition to the itemization of expenses required in non-merger settlements.

The Bruton Petition

11. Bruton asks the Commission to defer the effective date of the settlement limits and to require applicants who pay their hearing fee on or before March 15, 1991, to serve written notice of such payment on competing applicants. The purpose of the requested notice and the deferral of the effective date of settlement limits is to create a longer period of time for an applicant to offer unlimited settlement payments to other applicants after ascertaining, by payment of hearing fees, which of the other applicants intended to go forward and should be approached about settlement.

12. Upon reconsideration, we decline purposely to structure the effective dates of this proceeding and that portion of the companion *Memorandum Opinion and Order* [9] solely to create a "window" between payment of the hearing fee and settlement limits. Pending applicants have had ample notice of our intention to impose settlement

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[4] 47 U.S.C. 309(e).

[5] 326 U.S. 327 (1945)

[6] *See* 5 U.S. C. Section 553(d); 5 C.F.R. Section 1320.14(c).

[7] Because provisions adopted in the companion item do not require OMB clearance, the effect of the statutorily mandated delay will be to create a brief window between payment of the hearing fee and imposition of settlement limits. *See Memorandum Opinion and Order* in Docket 90-264 ("*Comparative Hearing Process Reform Reconsideration*"), FCC 91-154 (adopted May 9,1991).

[8] In finding this merger to be *bona fide*, despite prospective benefit to the dismissing applicant in excess of its out-of-pocket expenses, the Commission examined "such factors as the consideration to be paid to the surviving applicant, the form, timing, and certainty of consideration to be paid to the dismissing applicant, and the nature of any involvement in the surviving applicant's business by the dismissing applicant."90 FCC 2d at 313. The dismissing applicant was to become a director, stockholder, and the full-time station manager of the surviving applicant's station at the prevailing salary for comparable positions in the area. Thus, the dismissing applicant was truly sharing in the "risks and rewards" of the surviving applicant's business. In addition to dismissing his application, the dismissing applicant would benefit the surviving applicant by enhancing its integration credit and providing expertise. Finally -- and significantly -- the dismissing applicant's consideration was by no means certain. Even after the merger was consummated, seven applicants remained in the proceeding. If the surviving applicant decided not to prosecute its application through the comparative proceeding or if its application was denied, the dismissing applicant's consideration would be worthless.

[9] *Comparative Hearing Process Reform Reconsideration, supra.*

limits and can settle without any limits before the effective date of the rules adopted herein. Moreover, as noted above, other factors create a brief window of opportunity between the fee payment date and the effectiveness of the settlement limits. For these reasons, we deny the Bruton petition.

The NAACP Petition

13. The NAACP requests reconsideration of our determination that its proposals for minority third-party buyouts and a minority media ownership trust were beyond the scope of this proceeding. We modify our rationale to reach the merits of the buy-out proposal because it is inconsistent with the rationale of our decision herein. A minority media ownership trust, however, could be implemented regardless of any settlement limits by allowing settlements above whatever limits are adopted if a portion of the excess is paid into a fund to support minority media ownership. In light of the broad range of issues, unrelated to the settlement limitations adopted herein, implicated by the minority trust proposal, and the fact that adoption of limits in this proceeding does not foreclose establishment of the trust, we affirm our determination that the proposal is beyond the scope of this proceeding.

Minority third-party buyouts

14. The NAACP advocated a limited exception for minorities to what it characterizes as a general prohibition against third-party buyouts. Under the NAACP proposal, third-party buyouts would be permitted when (a) the buyer is a minority entity; or (b) the non-minority buyer promises to install a minority individual as the Managing Partner and fully integrated General Manager of the station, provides that minority individual a right of first refusal within two years to buy the station for 75 percent of fair market value and, if that right is rejected, sells the station within a year to another minority for 75 percent of fair market value. We decline to grant such an exception and deny that portion of the Petition.

15. In our reconsideration of the *Rebecca Radio of Marco* decision, we recognized that pre-hearing agreements involving a non-applicant buyout would create an economic incentive for individuals to file sham applications in future cases. [10] The *Marco* decision did not directly address the issue of post-hearing third-party buyouts, and the Commission approved such a buyout in *James U. Steele*. [11] Consistent with our concern in *Marco* with any action that might create an incentive for abuse, we approved the buyout in *Steele* only after expressly finding that approving that particular settlement arrangement would create no potential for future abuse of Commission processes.

16. While we are interested in new and creative proposals to foster our longstanding goal of diversifying ownership of broadcast media, we cannot adopt policies that, no matter how well-intentioned, hold substantial potential for abuse of Commission processes. A general exception for minorities to this prohibition on third-party buyouts would create such potential for abuse. Finally, we note that minorities who want to own a broadcast station can participate from the outset in the comparative hearing process, in which they may seek a substantial comparative preference.

Minority Media Ownership Trust

17. The NAACP proposed the creation of a trust for minority broadcast ownership, which would provide equity for minority entrepreneurs and funding for informational, educational, and training initiatives by nonprofit organizations. The trust would be financed from a portion of the proceeds of comparative hearing settlements.

18. This proposal raises a number of issues that are best addressed in a separate proceeding. The Commission has received a number of proposals to foster minority ownership, which will be considered separately. [12]

Regulatory Flexibility Act

19. A Final Regulatory Flexibility Analysis is contained in Appendix B to this Memorandum Opinion and Order.

Conclusion

20. Accordingly, IT IS ORDERED that the Petition for Partial Reconsideration of the Federal Communications Bar Association IS GRANTED.

21. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Hampton Broadcasting *et al.* IS GRANTED to the extent indicated above and IS DENIED in all other respects.

22. IT IS FURTHER ORDERED that the Petition for Partial Reconsideration and Request for Deferral of Effective Date filed by Melanie Bruton *et al.* IS DENIED.

23. IT IS FURTHER ORDERED that the Petition for Reconsideration, or in the Alternative Petition for Rulemaking filed by the National Association for the Advancement of Colored People, *et al.* IS DENIED to the extent indicated above.

24. IT IS FURTHER ORDERED that the Motion for Partial Deferral of Effective Date filed by the Federal Communications Bar Association is DISMISSED AS MOOT.

25. IT IS FURTHER ORDERED that pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154 and 303, Parts 73 and 74 of the Commission Rules, 47 C.F.R. Parts 73 and 74, ARE AMENDED as set forth below, effective August 1, 1991, subject to Office of Management and Budget approval.

26. Further information on this proceeding may be obtained by contacting Beverly McKittrick, Mass Media Bureau at (202) 632-5414.

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[10] *See* 5 FCC Rcd 937 (1990), *recon. denied*, 5 FCC Rcd 2913 (1990), *appeal pending sub nom. Rowland Gulf Radio, Inc. v. FCC*, No. 90-1308 (DC Cir. June 11, 1990).

[11] *Order*, 5 FCC Rcd 4121 (1990).

[12] *See* Petition for Rule Making of the National Association for the Advancement of Colored People, the League of United Latin American Citizens, the National Hispanic Media Coalition, and the National Black Media Coalition (filed Sept. 18, 1990). That pleading seeks modification of ownership limits and rules and procedures regarding station transfer and the comparative hearing process designed to enhance minority ownership.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. Sections 154 and 303.

2. Section 73.3525 is amended by revising the last sentence in introductory paragraph (a), revising paragraph (a)(1), substituting a semicolon for the period at the end of paragraph (a)(2), adding new paragraphs (a)(3), (a)(4), (a)(5), and (a)(6), and adding new paragraphs (i), (j), and (k), to read as follows:

Section 73.3525 Agreements for removing application conflicts.

(a) * * * The joint request shall be accompanied by a copy of the agreement, including any ancillary agreements, and an affidavit of each party to the agreement setting forth:

(1) The reasons why it is considered that such agreement is in the public interest;

(2) A statement that its application was not filed for the purpose of reaching or carry out such agreement;

(3) A certification that neither the applicant nor its principals has received any money or other consideration in excess of the legitimate and prudent expenses of the applicant; *Provided* that this provision shall not apply to *bona fide* merger agreements;

(4) The exact nature and amount of any consideration paid or promised;

(5) An itemized accounting of the expenses for which it seeks reimbursement; and

(6) The terms of any oral agreement relating to the dismissal or withdrawal of its application.

* * * * *

(i) For purposes of this section, "legitimate and prudent expenses" are those expenses reasonably incurred by an applicant in preparing, filing, prosecuting, and settling its application for which reimbursement is being sought.

(j) For purposes of this section, "other consideration" consists of financial concessions, including, but not limited to the transfer of assets or the provision of tangible pecuniary benefit, as well as non-financial concessions that confer any type of benefit on the recipient.

(k) For purposes of this section, an "ancillary agreement" means any agreement relating to the dismissal of an application or settling of a proceeding, including any agreement on the part of an applicant or principal of an applicant to render consulting services to another party or principal of another party in the proceeding.

Note: Although Section 74.780 of the Rules makes this section generally applicable to low power TV, TV translators, and TV booster stations, subsection (b) of this section shall not be applicable to such stations. Part 74 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 74 continues to read as follows:

AUTHORITY: 47 U.S.C. Sections 154 and 303.

2. Section 74.780 is amended by deleting the subsection references in the paragraph that cross-references Section 73.3525, to read as follows:

Section 74.780 Broadcast regulations applicable to translators, low power, and booster stations.

* * * * *

Section 73.3525 -- Agreements for removing application conflicts.

* * * * *

APPENDIX B

Final Regulatory Flexibility Analysis Statement

1. This action is taken as part of the Commission's continuing effort to eliminate abuse of its processes. It is additionally intended to expedite the comparative licensing process by reducing the volume of applications filed and by removing profit as a consideration in settlement agreements, and to facilitate the provision of new service to the public.

Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis

2. No comments were received relating to the Initial Regulatory Flexibility Analysis.

Significant alternatives considered and rejected

3. The *Report and Order* in this proceeding limited settlement payments to expenses up until the point that the hearing commenced and prohibited any payments at all thereafter. This option might encourage settlement early in the hearing process, but would discourage parties that had failed to settle early from settling at some later point in the proceeding. Moreover, this option might disadvantage less well-financed applicants who cannot afford losing an opportunity to settle for their expenses. Finally, applicants cannot always accurately assess their likelihood of success before the hearing starts.

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

RE: AMENDMENT OF SECTION 73.3525 OF THE COMMISSION'S RULES REGARDING SETTLEMENT AGREEMENTS AMONG APPLICANTS FOR CONSTRUCTION PERMITS (MM Docket 90-263).

I support this item because I believe it is important that we ensure that our processes serve the public interest instead of the interests of a few private speculators. It is my hope that the limitation of settlement payments to legitimate and prudent expenses will move us in that direction. At the same time, however, I am concerned that as the Commission reforms its procedural processes, it also remains sensitive to considering the needs of small businesses who attempt to participate in these proceedings. The Commission must be sensitive to the difficulty of obtaining financing and the expenses incurred by small businesses when engaging in our licensing proceedings for new services. Thus, I hope that the Commission will be amenable to establishing an advisory committee that reviews the implications of FCC proceedings with respect to small businesses, particularly new entrants. We must ensure that our processes give everyone a legitimate chance to participate in various aspects of the changing communications marketplace.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 16, 1991

COMMENTS INVITED ON ARIZONA PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Arizona (Region 3).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, parties may file comments on or before **June 25, 1991** and reply comments on or before **July 10, 1991.** (*See* Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket No. 87-112, Region 3 consists of the State of Arizona. (*See* Memorandum Opinion and Order, General Docket No. 87-112, 3 FCC Rcd 2113 (1988)).

Comments should be clearly identified as submissions to *PR Docket 91-143, Arizona - Region 3,* and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Betty Woolford Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8117.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies — Transmittal Nos. 410 and 428

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: May 14, 1991; Released: May 14, 1991

By the Chief, Common Carrier Bureau:

1. On February 8, 1991, Bell Atlantic filed Transmittal No. 410 to provide out-of-band signaling via interconnection with its Signaling System 7 (SS7) network as a Local Transport nonchargeable optional feature with Feature Group D (FGD) service. Description and Justification (D&J) at 1-1. In conjunction with out-of-band signaling, Bell Atlantic will make available three new services on a nonchargeable basis: Calling Party Number (CPN), Charge Number, and Carrier Selection Parameter.[1] CPN is available in all states of Bell Atlantic's region except Pennsylvania.[2] *Id.* at 1-6. The specific guidelines for interconnection are contained in a Bell Communications Research, Inc. publication which is referenced in the tariff. *Id.* at 1-5. On April 11, 1991, Bell Atlantic filed Transmittal No. 428 to make minor changes to Transmittal 410, as discussed below. [3] The tariff is scheduled to take effect on May 15, 1991.

2. MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate the tariff revisions on February 25, 1991. MCI requests the capability to connect its signaling end points to Bell Atlantic's End Offices. MCI Petition at 2. MCI also argues that the Commission should require Bell Atlantic to state in the tariff itself that Feature Group B (FGB) signaling will be available as soon as technically possible. *Id.* at 3-4. MCI expects Bell Atlantic to provide three-way diversity to the Signaling Point of Interface. *Id.* at 4-5. Further, MCI would like the Commission to require that all changes to the technical documents referenced in the tariff be filed as tariff changes.

3. Finally, MCI requests that the Commission order Bell Atlantic to provide CPN to interexchange carriers as a part of its provision of out-of-band signaling. MCI complains that Bell Atlantic's reference to its local exchange tariffs regarding the availability of CPN is not permitted by the Commission. MCI also claims that the restriction is wholly unwarranted since Bell Atlantic has the capability to provide CPN. *Id.* at 4.

4. In its reply comments, filed March 7, 1991, Bell Atlantic contends that MCI is simply repeating the arguments it made against BellSouth's out-of-band signaling proposal, which the Commission accepted without investigation.[4] Bell Atlantic Reply at 1. Bell Atlantic argues that even MCI admits that the capability to connect its SS7 network to Bell Atlantic's End Offices is not available *Id.* at 1-2. Bell Atlantic states that the decision to offer out-of-band signaling with FGB is a business judgment that should be left to the local exchange carrier. *Id.* at 2-3. On the technical issues raised by MCI, Bell Atlantic argues that MCI has not provided any basis for its objection to providing Bell Atlantic with information on MCI's network diversity. *Id.* at 4. Bell Atlantic also argues that it would be an unnecessary burden on Bell Atlantic and the Commission to require the carrier to file tariff revisions every time the technical references are updated. *Id.* at 4-5.

5. Regarding the provision of CPN, Bell Atlantic responds that the reference in the proposed tariff to the local exchange tariff is proper since it only deals with conditions under which the service is available, and does not incorporate intrastate rates or terms. In Transmittal 428 Bell Atlantic changed the footnotes in question to delete any reference to its local tariffs.[5] Bell Atlantic also states that it does not want to offer CPN in Pennsylvania while the Pennsylvania Supreme Court is reviewing the legality of Caller ID under state law. D&J at 3.

6. The Common Carrier Bureau has reviewed Bell Atlantic Transmittal Nos. 410 and 428, the MCI petition, and Bell Atlantic's reply. The limitation upon the Caller Party Number offering raises issues of concern to the Bureau. These issues are broader than the instant proceeding, however, and will be considered by the Bureau in the future. Therefore, we conclude that these issues do not warrant investigation of these transmittals at this time.

7. IT IS ORDERED that the petition to suspend and investigate Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 410, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] CPN provides the capability to identify the ten-digit calling station number. Charge Number identifies the ten-digit billing number of the calling station number. Description and Justification at 1-6. Carrier Selection Parameter identifies whether the end user accessed the carrier's network by dialing the carrier's 10XXX code or through presubscription. *Id.* at 1-7.

[2] Bell Atlantic states that the legality of Caller ID under Pennsylvania state law is currently being challenged before the Pennsylvania Supreme Court. *Id.* at 1-6, n.3.

[3] Transmittal No. 428 was filed pursuant to Special Permission No. 91-280, dated April 10, 1991.

[4] BellSouth Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 337, 5 FCC Rcd 7619 (Com.Car.Bur. 1990).

[5] The footnotes now read: "CPN is not offered in Pennsylvania, and/or where it is not technically feasible." Bell Atlantic Tariff F.C.C. No. 1, 6th revised page 177, n. +, 6th revised page 189.1, 1st revised page 262.1, issued Apr. 11, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies — Transmittal No. 414

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: May 14, 1991; Released: May 15, 1991

By the Chief, Common Carrier Bureau:

1. The Bell Atlantic Telephone Companies (Bell Atlantic) filed Transmittal No. 414 on February 15, 1991, proposing rates and regulations for a new access service called Electronic ReQuest.[1] This service will provide online access to the Bell Atlantic directory assistance listings, which contain nearly 18 million entries. Bell Atlantic Description and Justification (D&J) at 12. These listings include residential, business, and government published numbers, which are updated daily. *Id.* at 1-3. Transmittal 414 is scheduled to become effective May 16, 1991.

2. On March 4, 1991, MCI Telecommunications Corporation (MCI) filed a petition requesting that the Commission suspend and investigate Transmittal 414. According to MCI, Bell Atlantic's usage sensitive Screen Charge of $0.14 per screen is significantly above the fully distributed unit cost of $0.1183 per screen. MCI Petition at 2.

3. MCI also expresses concern with Bell Atlantic's nonrecurring Service Establishment Charge, and in particular, that charge's sales negotiation component. *Id.* at 3. MCI argues that Electronic ReQuest Service should not require 20 hours of sales negotiation because Bell Atlantic, in its D&J, identifies six customers who are expected to subscribe to Electronic ReQuest in the first year, with each customer intending to purchase multiple user IDs. *Id.* MCI further suggests that Bell Atlantic may be double recovering its costs by recovering the same service establishment costs through its Screen Charge. According to MCI, Bell Atlantic claims that it will recover customer support expenses from its Screen Charge. *Id.* at 4. MCI argues that the Commission should require Bell Atlantic to explain how these two costs differ and guarantee that the carrier recovers only actual costs. *Id.*

4. Bell Atlantic, in a reply filed March 14, 1991, responds that MCI has no basis for criticizing Electronic ReQuest rates, and that MCI's petition represents a collateral attack on the LEC price cap rules. Bell Atlantic Reply at 1. Bell Atlantic claims that MCI mistakenly argues the rate of $0.14 per screen is significantly above the fully distributed cost of $0.1183. *Id.* at 2. According to Bell Atlantic, $0.1183 represents a direct unit cost, not a fully distributed cost. Bell Atlantic contends that a fully distributed cost includes the cost of overhead expenses and a margin to offset the reduction in net revenue caused by the cross-elasticity between Electronic ReQuest and Bell Atlantic's normal Directory Assistance service. Bell Atlantic claims that it set the rate of $0.14 per screen "to cover the direct unit cost, make a contribution to overheads, and satisfy the net revenue test." *Id.*

5. Bell Atlantic also dismisses MCI's claim that it set an excessive rate to recover the nonrecurring cost of sales negotiation. *Id.* Bell Atlantic explains that the 20 hours of sales negotiation represent the cost of processing the service orders, not soliciting customers. *Id.* at 23. According to Bell Atlantic, it provides a detailed account of the tasks represented by the 20 hour estimate. *Id.* at 3, nn. 9 & 10.

6. Finally, Bell Atlantic argues that it has not attempted to recover the same customer support costs in the Screen Charge and the nonrecurring Service Establishment Charge. According to Bell Atlantic, the customer support costs recovered by the Screen Charge consist of costs incurred by the Bell Atlantic Customer Assistance Center after the customer has begun to use Electronic ReQuest. *Id.* at 4. Bell Atlantic contends this customer support is different from the after sale negotiations recovered by the nonrecurring Service Establishment Charge; these customer support costs are incurred after sale negotiations, but before the customer begins Electronic ReQuest Service. *Id.*

7. The Common Carrier Bureau has reviewed Bell Atlantic Transmittal 414, the Description and Justification supporting it, and all associated pleadings. We conclude that no compelling argument has been presented that warrants suspension and investigation at this time.

8. Accordingly, IT IS ORDERED that the petition to suspend and investigate Bell Atlantic Transmittal No. 414 filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[1] Bell Atlantic was granted a waiver of Part 69 of the Commission's Rules, 47 C.F.R. Part 69, to permit it to establish new rate elements to recover the costs of providing this new service. Bell Atlantic Telephone Companies, Petition for Waiver of Part 69 of the Commission's Rules for Electronic Directory Assistance Service, Order, 6 FCC Rcd 971 (Com. Car. Bur. 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Midco Communications
Complainant,

v. File No. IC-89-07448

Northwestern Bell Telephone Co.
Defendant.

ORDER

Adopted: May 13, 1991; Released: May 22, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On July 25, 1989, the above-named complainant filed an informal complaint with this Commission pursuant to Section 208 of the Communications Act (the Act), 47 U.S.C. §208 and Sections 1.711 - 1.718 of the Commission's Rules, 47 C.F.R. §1.711 - 1.718. The complainant alleges that the exchange access services it purchased from the defendant Northwestern Bell were provided in violation of Section 202 of the Act, 47 U.S.C. §202(a), in that "like services" were provided to AT&T by Northwestern Bell under a contract known as a Shared Network Facilities Agreement (SNFA) at less than the tariffed rates paid by the complainant. The defendant has filed a report generally denying the complainant's allegations.

2. There are no indications in the defendant's report that the complaint has been satisfied. Section 1.718 of the Rules provides that when a carrier's report does not satisfy an informal complaint, the complainant may file a formal complaint pursuant to Sections 1.720 - 1.734 of the Rules, 47 C.F.R. §1.720 - 1.734. The formal complaint will be deemed to relate back to the filing date of the informal complaint if the formal complaint is filed within six months of the carrier's report, makes specific reference to the date of informal complaint, and is based on the same cause of action. Section 1.718 further provides that the complainant "will be deemed to have abandoned the unsatisfied informal complaint" if no formal complaint is filed within the six-month period. In the instant case, the six-month period for pursuing a formal complaint expired on May 15, 1990. However, Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, provides that the Rules may be waived for good cause. In the instant case, we find that good cause exists to waive Section 1.718 and we do so on our own motion.

3. The Commission currently has underway a tariff investigation in CC Docket No. 85-166 which involves the same basic issues regarding SNFAs that underlie this complaint. *See Investigation of Special Access Tariffs Local Exchange Carriers,* Memorandum Opinion and Order, CC Docket No. 85-166 (Docket 85-166), Phase I, FCC 86-52, (released Jan. 24, 1986), *rev'd remanded sub nom. MCI Telecommunications Corp. v. FCC,* 842 F. 2d 1296 (DC Cir. 1988), Memorandum Opinion and Order, 4 FCC Rcd 687 (Com. Car. Bur. 1989). In *MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.,* 4 FCC Rcd 8227 (Com. Car. Bur. 1989), the Common Carrier Bureau held in abeyance a number of similar complaints involving SNFAs pending resolution of the tariff investigation. Given the similarity of the instant case to the related tariff investigation, we conclude that the public interest would not be served by requiring the complainant to file a formal complaint within the six-month period specified by Section 1.718 in order to continue to pursue its claim.

4. Accordingly, IT IS ORDERED, pursuant to the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that Section 1.718 IS WAIVED and that the above-captioned informal complaint proceeding be held in abeyance pending resolution of the Docket 85-166 tariff investigation. At that time the Bureau will, if necessary, set a new deadline for the filing of a formal complaint. In the meantime, the parties are directed to retain all records that may be relevant to the complaint until the Commission has issued a final ruling in this matter.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington DC 20554

In the Matter of

LDDS Communications, Inc.
Complainant,

v. File No. IC-89-06692

Bell of Pennsylvania, Chesapeake
and Potomac (DC, MD, VA, WVA),
Diamond State, New Jersey Bell,
Illinois Bell, Indiana Bell,
Michigan Bell, Ohio Bell,
Wisconsin Bell, Mountain States,
Northwestern Bell, Pacific
Northwest Bell, Nevada Bell,
Pacific Bell, New England
Telephone, New York Telephone,
South Central Bell, Southern Bell,
Southwestern Bell,
and
American Telephone and
Telegraph Company
Defendants.

ORDER

Adopted: May 13, 1991; Released: May 22, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On July 28, 1989, the above-named complainant filed an informal complaint with this Commission pursuant to Section 208 of the Communications Act (the Act), 47 U.S.C. §208 and Sections 1.711 - 1.718 of the Commission's Rules, 47 C.F.R. §1.711 - 1.718. The complainant alleges that the exchange access services it purchased from the defendant Bell Operating Companies (BOCs) were provided in violation of Section 202 of the Act, 47 U.S.C. §202(a), in that "like services" were provided to AT&T by the BOCs under contracts known as Shared Network Facilities Agreements (SNFAs) at less than the tariffed rates paid by the complainant. The defendants have all filed reports generally denying the complainants' allegations.

2. There are no indications in the defendants' reports that the complaint has been satisfied. Section 1.718 of the Rules provides that when a carrier's report does not satisfy an informal complaint, the complainant may file a formal complaint pursuant to Sections 1.720 - 1.734 of the Rules, 47 C.F.R. §1.720 - 1.734. The formal complaint will be deemed to relate back to the filing date of the informal complaint if the formal complaint is filed within six months of the carrier's report, makes specific reference to the date of informal complaint, and is based on the same cause of action. Section 1.718 further provides that the complainant "will be deemed to have abandoned the unsatisfied informal complaint" if no formal complaint is filed within the six-month period. In the instant case, the six-month period for pursuing a formal complaint expired on May 10, 1990. However, Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, provides that the Rules may be waived for good cause. In the instant case, we find that good cause exists to waive Section 1.718 and we do so on our own motion.

3. The Commission currently has underway a tariff investigation in CC Docket No. 85-166 which involves the same basic issues regarding SNFAs that underlie this complaint. *See Investigation of Special Access Tariffs Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166 (Docket 85-166), Phase I, FCC 86-52, (released Jan. 24, 1986), *rev'd remanded sub nom. MCI Telecommunications Corp. v. FCC*, 842 F. 2d 1296 (DC Cir. 1988), Memorandum Opinion and Order, 4 FCC Rcd 687 (Com. Car. Bur. 1989). In *MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.*, 4 FCC Rcd 8227 (Com. Car. Bur. 1989), the Common Carrier Bureau held in abeyance a number of similar complaints involving SNFAs pending resolution of the tariff investigation. Given the similarity of the instant case to the related tariff investigation, we conclude that the public interest would not be served by requiring the complainant to file a formal complaint within the six-month period specified by Section 1.718 in order to continue to pursue its claim.

4. Accordingly, IT IS ORDERED, pursuant to the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that Section 1.718 IS WAIVED and that the above-captioned informal complaint proceeding be held in abeyance pending resolution of the Docket 85-166 tariff investigation. At that time the Bureau will, if necessary, set a new deadline for the filing of a formal complaint. In the meantime, the parties are directed to retain all records that may be relevant to the complaint until the Commission has issued a final ruling in this matter.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mid-American
Long Distance Co.
Complainant,

v. File No. IC-89-06255

New Jersey Bell, Pacific
Northwest Bell
and
American Telephone
and Telegraph Company
Defendants.

ORDER

Adopted: May 13, 1991; Released: May 22, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On July 14, 1989, the above-named complainant filed an informal complaint with this Commission pursuant to Section 208 of the Communications Act (the Act), 47 U.S.C. §208 and Sections 1.711 - 1.718 of the Commission's Rules, 47 C.F.R. §1.711 - 1.718. The complainant alleges that the exchange access services it purchased from the defendant Bell Operating Companies (BOCs) were provided in violation of Section 202 of the Act, 47 U.S.C. §202(a), in that "like services" were provided to AT&T by the BOCs under contracts known as Shared Network Facilities Agreements (SNFAs) at less than the tariffed rates paid by the complainant. The defendants have all filed reports generally denying the complainants' allegations.

2. There are no indications in the defendants' reports that the complaint has been satisfied. Section 1.718 of the Rules provides that when a carrier's report does not satisfy an informal complaint, the complainant may file a formal complaint pursuant to Sections 1.720 - 1.734 of the Rules, 47 C.F.R. §1.720 - 1.734. The formal complaint will be deemed to relate back to the filing date of the informal complaint if the formal complaint is filed within six months of the carrier's report, makes specific reference to the date of informal complaint, and is based on the same cause of action. Section 1.718 further provides that the complainant "will be deemed to have abandoned the unsatisfied informal complaint" if no formal complaint is filed within the six-month period. In the instant case, the six-month period for pursuing a formal complaint expired on May 10, 1990. However, Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, provides that the Rules may be waived for good cause. In the instant case, we find that good cause exists to waive Section 1.718 and we do so on our own motion.

3. The Commission currently has underway a tariff investigation in CC Docket No. 85-166 which involves the same basic issues regarding SNFAs that underlie this complaint. *See Investigation of Special Access Tariffs Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166 (Docket 85-166), Phase I, FCC 86-52, (released Jan. 24, 1986), *rev'd remanded sub nom. MCI Telecommunications Corp. v. FCC*, 842 F. 2d 1296 (DC Cir. 1988), Memorandum Opinion and Order, 4 FCC Rcd 687 (Com. Car. Bur. 1989). In *MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.*, 4 FCC Rcd 8227 (Com. Car. Bur. 1989), the Common Carrier Bureau held in abeyance a number of similar complaints involving SNFAs pending resolution of the tariff investigation. Given the similarity of the instant case to the related tariff investigation, we conclude that the public interest would not be served by requiring the complainant to file a formal complaint within the six-month period specified by Section 1.718 in order to continue to pursue its claim.

4. Accordingly, IT IS ORDERED, pursuant to the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that Section 1.718 IS WAIVED and that the above-captioned informal complaint proceeding be held in abeyance pending resolution of the Docket 85-166 tariff investigation. At that time the Bureau will, if necessary, set a new deadline for the filing of a formal complaint. In the meantime, the parties are directed to retain all records that may be relevant to the complaint until the Commission has issued a final ruling in this matter.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Phone America of Carolina, Inc.
Complainant,

v. File No. IC-89-06184

Bell of Pennsylvania,
Chesapeake and Potomac
(DC, MD, VA), Diamond
State, New Jersey Bell,
Illinois Bell, Ohio Bell,
Michigan Bell, Pacific Bell,
New England Telephone,
New York Telephone,
South Central Bell, Southern Bell,
Southwestern Bell,
and
American Telephone and
Telegraph Company
Defendants.

ORDER

Adopted: May 13, 1991; Released: May 22, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On July 7, 1989, the above-named complainant filed an informal complaint with this Commission pursuant to Section 208 of the Communications Act (the Act), 47 U.S.C. §208 and Sections 1.711 - 1.718 of the Commission's Rules, 47 C.F.R. §1.711 - 1.718. The complainant alleges that the exchange access services it purchased from the defendant Bell Operating Companies (BOCs) were provided in violation of Section 202 of the Act, 47 U.S.C. §202(a), in that "like services" were provided to AT&T by the BOCs under contracts known as Shared Network Facilities Agreements (SNFAs) at less than the tariffed rates paid by the complainant. The defendants have all filed reports generally denying the complainants' allegations.

2. There are no indications in the defendants' reports that the complaint has been satisfied. Section 1.718 of the Rules provides that when a carrier's report does not satisfy an informal complaint, the complainant may file a formal complaint pursuant to Sections 1.720 - 1.734 of the Rules, 47 C.F.R. §1.720 - 1.734. The formal complaint will be deemed to relate back to the filing date of the informal complaint if the formal complaint is filed within six months of the carrier's report, makes specific reference to the date of informal complaint, and is based on the same cause of action. Section 1.718 further provides that the complainant "will be deemed to have abandoned the unsatisfied informal complaint" if no formal complaint is filed within the six-month period. In the instant case, the six-month period for pursuing a formal complaint expired on May 10, 1990. However, Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, provides that the Rules may be waived for good cause. In the instant case, we find that good cause exists to waive Section 1.718 and we do so on our own motion.

3. The Commission currently has underway a tariff investigation in CC Docket No. 85-166 which involves the same basic issues regarding SNFAs that underlie this complaint. *See Investigation of Special Access Tariffs Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166 (Docket 85-166), Phase I, FCC 86-52, (released Jan. 24, 1986), *rev'd remanded sub nom. MCI Telecommunications Corp. v. FCC*, 842 F. 2d 1296 (DC Cir. 1988), Memorandum Opinion and Order, 4 FCC Rcd 687 (Com. Car. Bur. 1989). In *MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.*, 4 FCC Rcd 8227 (Com. Car. Bur. 1989), the Common Carrier Bureau held in abeyance a number of similar complaints involving SNFAs pending resolution of the tariff investigation. Given the similarity of the instant case to the related tariff investigation, we conclude that the public interest would not be served by requiring the complainant to file a formal complaint within the six-month period specified by Section 1.718 in order to continue to pursue its claim.

4. Accordingly, IT IS ORDERED, pursuant to the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that Section 1.718 IS WAIVED and that the above-captioned informal complaint proceeding be held in abeyance pending resolution of the Docket 85-166 tariff investigation. At that time the Bureau will, if necessary, set a new deadline for the filing of a formal complaint. In the meantime, the parties are directed to retain all records that may be relevant to the complaint until the Commission has issued a final ruling in this matter.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Telesphere Network, Inc.
Complainant,

v. File No. IC-89-06183

Chesapeake and Potomac (WV),
Diamond State, New Jersey Bell,
Ohio Bell, Wisconsin Bell,
Mountain States, Northwestern
Bell, Pacific Northwest Bell,
Nevada Bell, New England Telephone,
and
American Telephone
and Telegraph Company
Defendants.

ORDER

Adopted: May 13, 1991; Released: May 22, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On July, 7, 1989, the above-named complainant filed an informal complaint with this Commission pursuant to Section 208 of the Communications Act (the Act), 47 U.S.C. §208 and Sections 1.711 - 1.718 of the Commission's Rules, 47 C.F.R. §1.711 - 1.718. The complainant alleges that the exchange access services it purchased from the defendant Bell Operating Companies (BOCs) were provided in violation of Section 202 of the Act, 47 U.S.C. §202(a), in that "like services" were provided to AT&T by the BOCs under contracts known as Shared Network Facilities Agreements (SNFAs) at less than the tariffed rates paid by the complainant. The defendants have all filed reports generally denying the complainants' allegations.

2. There are no indications in the defendants' reports that the complaint has been satisfied. Section 1.718 of the Rules provides that when a carrier's report does not satisfy an informal complaint, the complainant may file a formal complaint pursuant to Sections 1.720 - 1.734 of the Rules, 47 C.F.R. §1.720 - 1.734. The formal complaint will be deemed to relate back to the filing date of the informal complaint if the formal complaint is filed within six months of the carrier's report, makes specific reference to the date of informal complaint, and is based on the same cause of action. Section 1.718 further provides that the complainant "will be deemed to have abandoned the unsatisfied informal complaint" if no formal complaint is filed within the six-month period. In the instant case, the six-month period for pursuing a formal complaint expired on May 10, 1990. However, Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, provides that the Rules may be waived for good cause. In the instant case, we find that good cause exists to waive Section 1.718 and we do so on our own motion.

3. The Commission currently has underway a tariff investigation in CC Docket No. 85-166 which involves the same basic issues regarding SNFAs that underlie this complaint. *See Investigation of Special Access Tariffs Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166 (Docket 85-166), Phase I, FCC 86-52, (released Jan. 24, 1986), *rev'd remanded sub nom. MCI Telecommunications Corp. v. FCC*, 842 F. 2d 1296 (DC Cir. 1988), Memorandum Opinion and Order, 4 FCC Rcd 687 (Com. Car. Bur. 1989). In *MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.*, 4 FCC Rcd 8227 (Com. Car. Bur. 1989), the Common Carrier Bureau held in abeyance a number of similar complaints involving SNFAs pending resolution of the tariff investigation. Given the similarity of the instant case to the related tariff investigation, we conclude that the public interest would not be served by requiring the complainant to file a formal complaint within the six-month period specified by Section 1.718 in order to continue to pursue its claim.

4. Accordingly, IT IS ORDERED, pursuant to the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that Section 1.718 IS WAIVED and that the above-captioned informal complaint proceeding be held in abeyance pending resolution of the Docket 85-166 tariff investigation. At that time the Bureau will, if necessary, set a new deadline for the filing of a formal complaint. In the meantime, the parties are directed to retain all records that may be relevant to the complaint until the Commission has issued a final ruling in this matter.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Mid-Atlantic Telecom, Inc.
Complainant,

v. File No. IC-89-06158

Bell of Pennsylvania,
Chesapeake and Potomac (WV),
Diamond State, New Jersey Bell,
Illinois Bell, Indiana Bell,
Ohio Bell, Mountain States,
Northwestern Bell, Pacific
Northwest Bell, Pacific Bell,
New England Telephone, New York
Telephone, South Central Bell,
Southern Bell, Southwestern Bell,
and
American Telephone and
Telegraph Company
Defendants.

ORDER

Adopted: May 13, 1991; Released: May 22, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On July 3, 1989, the above-named complainant filed an informal complaint with this Commission pursuant to Section 208 of the Communications Act (the Act), 47 U.S.C. §208 and Sections 1.711 - 1.718 of the Commission's Rules, 47 C.F.R. §1.711 - 1.718. The complainant alleges that the exchange access services it purchased from the defendant Bell Operating Companies (BOCs) were provided in violation of Section 202 of the Act, 47 U.S.C. §202(a), in that "like services" were provided to AT&T by the BOCs under contracts known as Shared Network Facilities Agreements (SNFAs) at less than the tariffed rates paid by the complainant. The defendants have all filed reports generally denying the complainants' allegations.

2. There are no indications in the defendants' reports that the complaint has been satisfied. Section 1.718 of the Rules provides that when a carrier's report does not satisfy an informal complaint, the complainant may file a formal complaint pursuant to Sections 1.720 - 1.734 of the Rules, 47 C.F.R. §1.720 - 1.734. The formal complaint will be deemed to relate back to the filing date of the informal complaint if the formal complaint is filed within six months of the carrier's report, makes specific reference to the date of informal complaint, and is based on the same cause of action. Section 1.718 further provides that the complainant "will be deemed to have abandoned the unsatisfied informal complaint" if no formal complaint is filed within the six-month period. In the instant case, the six-month period for pursuing a formal complaint expired on May 10, 1990. However, Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, provides that the Rules may be waived for good cause. In the instant case, we find that good cause exists to waive Section 1.718 and we do so on our own motion.

3. The Commission currently has underway a tariff investigation in CC Docket No. 85-166 which involves the same basic issues regarding SNFAs that underlie this complaint. *See Investigation of Special Access Tariffs Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166 (Docket 85-166), Phase I, FCC 86-52, (released Jan. 24, 1986), *rev'd remanded sub nom. MCI Telecommunications Corp. v. FCC*, 842 F. 2d 1296 (DC Cir. 1988), Memorandum Opinion and Order, 4 FCC Rcd 687 (Com. Car. Bur. 1989). In *MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.*, 4 FCC Rcd 8227 (Com. Car. Bur. 1989), the Common Carrier Bureau held in abeyance a number of similar complaints involving SNFAs pending resolution of the tariff investigation. Given the similarity of the instant case to the related tariff investigation, we conclude that the public interest would not be served by requiring the complainant to file a formal complaint within the six-month period specified by Section 1.718 in order to continue to pursue its claim.

4. Accordingly, IT IS ORDERED, pursuant to the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that Section 1.718 IS WAIVED and that the above-captioned informal complaint proceeding be held in abeyance pending resolution of the Docket 85-166 tariff investigation. At that time the Bureau will, if necessary, set a new deadline for the filing of a formal complaint. In the meantime, the parties are directed to retain all records that may be relevant to the complaint until the Commission has issued a final ruling in this matter.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ITT Communications
Services, Inc.
Complainant,

v. File No. IC-90-00507

Illinois Bell, Indiana Bell,
Michigan Bell, Ohio Bell,
Wisconsin Bell, Mountain States,
Northwestern Bell, Pacific
Northwest Bell, Nevada Bell,
Pacific Bell, New England
Telephone, New York Telephone,
South Central Bell, Southern Bell,
Southwestern Bell,
and
American Telephone and
Telegraph Company
Defendants.

ORDER

Adopted: May 13, 1991; Released: May 22, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 23, 1989, the above-named complainant filed an informal complaint with this Commission pursuant to Section 208 of the Communications Act (the Act), 47 U.S.C. §208 and Sections 1.711 - 1.718 of the Commission's Rules, 47 C.F.R. §1.711 - 1.718. The complainant alleges that the exchange access services it purchased from the defendant Bell Operating Companies (BOCs) were provided in violation of Section 202 of the Act, 47 U.S.C. §202(a), in that "like services" were provided to AT&T by the BOCs under contracts known as Shared Network Facilities Agreements (SNFAs) at less than the tariffed rates paid by the complainant. The defendants have all filed reports generally denying the complainants' allegations.

2. There are no indications in the defendants' reports that the complaint has been satisfied. Section 1.718 of the Rules provides that when a carrier's report does not satisfy an informal complaint, the complainant may file a formal complaint pursuant to Sections 1.720 - 1.734 of the Rules, 47 C.F.R. §1.720 - 1.734. The formal complaint will be deemed to relate back to the filing date of the informal complaint if the formal complaint is filed within six months of the carrier's report, makes specific reference to the date of informal complaint, and is based on the same cause of action. Section 1.718 further provides that the complainant "will be deemed to have abandoned the unsatisfied informal complaint" if no formal complaint is filed within the six-month period. In the instant case, the six-month period for pursuing a formal complaint expired on October 3, 1990. However, Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, provides that the Rules may be waived for good cause. In the instant case, we find that good cause exists to waive Section 1.718 and we do so on our own motion.

3. The Commission currently has underway a tariff investigation in CC Docket No. 85-166 which involves the same basic issues regarding SNFAs that underlie this complaint. *See Investigation of Special Access Tariffs Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166 (Docket 85-166), Phase I, FCC 86-52, (released Jan. 24, 1986), *rev'd remanded sub nom. MCI Telecommunications Corp. v. FCC*, 842 F. 2d 1296 (DC Cir. 1988), Memorandum Opinion and Order, 4 FCC Rcd 687 (Com. Car. Bur. 1989). In *MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.*, 4 FCC Rcd 8227 (Com. Car. Bur. 1989), the Common Carrier Bureau held in abeyance a number of similar complaints involving SNFAs pending resolution of the tariff investigation. Given the similarity of the instant case to the related tariff investigation, we conclude that the public interest would not be served by requiring the complainant to file a formal complaint within the six-month period specified by Section 1.718 in order to continue to pursue its claim.

4. Accordingly, IT IS ORDERED, pursuant to the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that Section 1.718 IS WAIVED and that the above-captioned informal complaint proceeding be held in abeyance pending resolution of the Docket 85-166 tariff investigation. At that time the Bureau will, if necessary, set a new deadline for the filing of a formal complaint. In the meantime, the parties are directed to retain all records that may be relevant to the complaint until the Commission has issued a final ruling in this matter.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Metromedia Long
Distance, Inc.
Complainant,

v. File No. IC-90-00506

Illinois Bell, Indiana Bell,
Michigan Bell, Ohio Bell,
Wisconsin Bell, Mountain States,
Northwestern Bell, Pacific
Northwest Bell, Nevada Bell,
Pacific Bell, New England
Telephone, New York Telephone,
South Central Bell, Southern Bell,
Southwestern Bell,
and
American Telephone
and Telegraph Company
Defendants.

ORDER

Adopted: May 13, 1991; Released: May 23, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 23, 1989, the above-named complainant filed an informal complaint with this Commission pursuant to Section 208 of the Communications Act (the Act), 47 U.S.C. §208 and Sections 1.711 - 1.718 of the Commission's Rules, 47 C.F.R. §1.711 - 1.718. The complainant alleges that the exchange access services it purchased from the defendant Bell Operating Companies (BOCs) were provided in violation of Section 202 of the Act, 47 U.S.C. §202(a), in that "like services" were provided to AT&T by the BOCs under contracts known as Shared Network Facilities Agreements (SNFAs) at less than the tariffed rates paid by the complainant. The defendants have all filed reports generally denying the complainants' allegations.

2. There are no indications in the defendants' reports that the complaint has been satisfied. Section 1.718 of the Rules provides that when a carrier's report does not satisfy an informal complaint, the complainant may file a formal complaint pursuant to Sections 1.720 - 1.734 of the Rules, 47 C.F.R. §1.720 - 1.734. The formal complaint will be deemed to relate back to the filing date of the informal complaint if the formal complaint is filed within six months of the carrier's report, makes specific reference to the date of informal complaint, and is based on the same cause of action. Section 1.718 further provides that the complainant "will be deemed to have abandoned the unsatisfied informal complaint" if no formal complaint is filed within the six-month period. In the instant case, the six-month period for pursuing a formal complaint expired on October 3, 1990. However, Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, provides that the Rules may be waived for good cause. In the instant case, we find that good cause exists to waive Section 1.718 and we do so on our own motion.

3. The Commission currently has underway a tariff investigation in CC Docket No. 85-166 which involves the same basic issues regarding SNFAs that underlie this complaint. *See Investigation of Special Access Tariffs Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166 (Docket 85-166), Phase I, FCC 86-52, (released Jan. 24, 1986), *rev'd remanded sub nom. MCI Telecommunications Corp. v. FCC*, 842 F. 2d 1296 (DC Cir. 1988), Memorandum Opinion and Order, 4 FCC Rcd 687 (Com. Car. Bur. 1989). In *MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.*, 4 FCC Rcd 8227 (Com. Car. Bur. 1989), the Common Carrier Bureau held in abeyance a number of similar complaints involving SNFAs pending resolution of the tariff investigation. Given the similarity of the instant case to the related tariff investigation, we conclude that the public interest would not be served by requiring the complainant to file a formal complaint within the six-month period specified by Section 1.718 in order to continue to pursue its claim.

4. Accordingly, IT IS ORDERED, pursuant to the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that Section 1.718 IS WAIVED and that the above-captioned informal complaint proceeding be held in abeyance pending resolution of the Docket 85-166 tariff investigation. At that time the Bureau will, if necessary, set a new deadline for the filing of a formal complaint. In the meantime, the parties are directed to retain all records that may be relevant to the complaint until the Commission has issued a final ruling in this matter.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

One Call
Communications, Inc.
Complainant,

v. File No. IC-89-06837

Bell of Pennsylvania,
Chesapeake and Potomac (DC),
New Jersey Bell, Illinois Bell,
Ohio Bell, Wisconsin Bell,
Mountain States, Northwestern
Bell, Pacific Northwest Bell,
Nevada Bell, Pacific Bell,
New England Telephone,
New York Telephone,
South Central Bell,
Southern Bell,
Southwestern Bell,
and
American Telephone
and Telegraph Company
Defendants.

ORDER

Adopted: May 13, 1991; Released: May 22, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 3, 1989, the above-named complainant filed an informal complaint with this Commission pursuant to Section 208 of the Communications Act (the Act), 47 U.S.C. §208 and Sections 1.711 - 1.718 of the Commission's Rules, 47 C.F.R. §1.711 - 1.718. The complainant alleges that the exchange access services it purchased from the defendant Bell Operating Companies (BOCs) were provided in violation of Section 202 of the Act, 47 U.S.C. §202(a), in that "like services" were provided to AT&T by the BOCs under contracts known as Shared Network Facilities Agreements (SNFAs) at less than the tariffed rates paid by the complainant. The defendants have all filed reports generally denying the complainants' allegations.

2. There are no indications in the defendants' reports that the complaint has been satisfied. Section 1.718 of the Rules provides that when a carrier's report does not satisfy an informal complaint, the complainant may file a formal complaint pursuant to Sections 1.720 - 1.734 of the Rules, 47 C.F.R. §1.720 - 1.734. The formal complaint will be deemed to relate back to the filing date of the informal complaint if the formal complaint is filed within six months of the carrier's report, makes specific reference to the date of informal complaint, and is based on the same cause of action. Section 1.718 further provides that the complainant "will be deemed to have abandoned the unsatisfied informal complaint" if no formal complaint is filed within the six-month period. In the instant case, the six-month period for pursuing a formal complaint expired on May 10, 1990. However, Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, provides that the Rules may be waived for good cause. In the instant case, we find that good cause exists to waive Section 1.718 and we do so on our own motion.

3. The Commission currently has underway a tariff investigation in CC Docket No. 85-166 which involves the same basic issues regarding SNFAs that underlie this complaint. *See Investigation of Special Access Tariffs Local Exchange Carriers*, Memorandum Opinion and Order, CC Docket No. 85-166 (Docket 85-166), Phase I, FCC 86-52, (released Jan. 24, 1986), *rev'd remanded sub nom. MCI Telecommunications Corp. v. FCC*, 842 F. 2d 1296 (DC Cir. 1988), Memorandum Opinion and Order, 4 FCC Rcd 687 (Com. Car. Bur. 1989). In *MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.*, 4 FCC Rcd 8227 (Com. Car. Bur. 1989), the Common Carrier Bureau held in abeyance a number of similar complaints involving SNFAs pending resolution of the tariff investigation. Given the similarity of the instant case to the related tariff investigation, we conclude that the public interest would not be served by requiring the complainant to file a formal complaint within the six-month period specified by Section 1.718 in order to continue to pursue its claim.

4. Accordingly, IT IS ORDERED, pursuant to the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that Section 1.718 IS WAIVED and that the above-captioned informal complaint proceeding be held in abeyance pending resolution of the Docket 85-166 tariff investigation. At that time the Bureau will, if necessary, set a new deadline for the filing of a formal complaint. In the meantime, the parties are directed to retain all records that may be relevant to the complaint until the Commission has issued a final ruling in this matter.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TCS Network Services
Complainant,

v. File No. IC-89-06027

Pacific Bell
Telephone Co.
Defendant.

ORDER

Adopted: May 13, 1991; Released: May 22, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On June 26, 1989, the above-named complainant filed an informal complaint with this Commission pursuant to Section 208 of the Communications Act (the Act), 47 U.S.C. §208 and Sections 1.711 - 1.718 of the Commission's Rules, 47 C.F.R. §1.711 - 1.718. The complainant alleges that the exchange access services it purchased from the defendant Pacific Bell were provided in violation of Section 202 of the Act, 47 U.S.C. §202(a), in that "like services" were provided to AT&T by Pacific Bell under a contract known as a Shared Network Facilities Agreement (SNFA) at less than the tariffed rates paid by the complainant. The defendant has filed a report generally denying the complainant's allegations.

2. There are no indications in the defendant's report that the complaint has been satisfied. Section 1.718 of the Rules provides that when a carrier's report does not satisfy an informal complaint, the complainant may file a formal complaint pursuant to Sections 1.720 - 1.734 of the Rules, 47 C.F.R. §1.720 - 1.734. The formal complaint will be deemed to relate back to the filing date of the informal complaint if the formal complaint is filed within six months of the carrier's report, makes specific reference to the date of informal complaint, and is based on the same cause of action. Section 1.718 further provides that the complainant "will be deemed to have abandoned the unsatisfied informal complaint" if no formal complaint is filed within the six-month period. In the instant case, the six-month period for pursuing a formal complaint expired on March 21, 1990. However, Section 1.3 of the Commission's Rules, 47 C.F.R. §1.3, provides that the Rules may be waived for good cause. In the instant case, we find that good cause exists to waive Section 1.718 and we do so on our own motion.

3. The Commission currently has underway a tariff investigation in CC Docket No. 85-166 which involves the same basic issues regarding SNFAs that underlie this complaint. *See Investigation of Special Access Tariffs Local Exchange Carriers,* Memorandum Opinion and Order, CC Docket No. 85-166 (Docket 85-166), Phase I, FCC 86-52, (released Jan. 24, 1986), *rev'd remanded sub nom. MCI Telecommunications Corp. v. FCC,* 842 F. 2d 1296 (DC Cir. 1988), Memorandum Opinion and Order, 4 FCC Rcd 687 (Com. Car. Bur. 1989). In *MCI Telecommunications Corp. v. Bell Tel. Co. of Pa.,* 4 FCC Rcd 8227 (Com. Car. Bur. 1989), the Common Carrier Bureau held in abeyance a number of similar complaints involving SNFAs pending resolution of the tariff investigation. Given the similarity of the instant case to the related tariff investigation, we conclude that the public interest would not be served by requiring the complainant to file a formal complaint within the six-month period specified by Section 1.718 in order to continue to pursue its claim.

4. Accordingly, IT IS ORDERED, pursuant to the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that Section 1.718 IS WAIVED and that the above-captioned informal complaint proceeding be held in abeyance pending resolution of the Docket 85-166 tariff investigation. At that time the Bureau will, if necessary, set a new deadline for the filing of a formal complaint. In the meantime, the parties are directed to retain all records that may be relevant to the complaint until the Commission has issued a final ruling in this matter.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Iowa RSA No. 4 Limited Partnership — File No. 07225-CL-MP-91

For Facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block B in Market 415, Iowa 4 - Muscatine RSA, for Station KNKN536

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 1991; Released: May 24, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. On December 19, 1990, Illinois Independent RSA No. 3 General Partnership (Illinois Independent) filed a Petition to Deny (Petition) against the captioned application of Iowa RSA No. 4 Limited Partnership (Iowa), which proposes to add a new cell at Burlington, Iowa in the Iowa 4 - Muscatine RSA (Muscatine RSA). The proposed cell would extend beyond the boundary of the Muscatine RSA and across the Mississippi River into the adjacent Illinois 3 - RSA, in which Illinois Independent holds the wireline construction authorization. On January 16, 1991, Iowa filed its opposition to the Petition.[1]

II. DISCUSSION

2. Illinois Independent alleges that Iowa has not provided a specific engineering justification for why the extension resulting from its proposed cell is necessary and unavoidable. Illinois Independent asserts that, although the application states the size of the extension as a percentage of the CGSA, there is no evidence of an attempt to reduce the size of the extension. Illinois Independent contends that the proposed extension is *prima facie* not de minimis because it constitutes 17% of the area of the proposed cell. *Rhys G. Mussman*, 3 FCC Rcd 6808, 6811 (Com. Car. Bur. 1988) (extension of 19% of cell may establish *prima facie* case that extension was not de minimis); *GTE Mobilnet of Cleveland*, 54 Rad. Reg. 2d (P&F) 1410, 1413 (Com. Car. Bur. 1983) (extension of 18% of cell was not de minimis).

3. Illinois Independent also alleges that the proposed cell is purposefully designed to provide service "to the suburban and rural areas *to the east* of Burlington."[2] The only area east of Burlington, it says, is within the Illinois-3 RSA, and includes 2,000 people, as well as four miles of U.S. Highway 34 in Illinois carrying 7500 passengers daily. Illinois Independent, citing *Delray Cellular Associates*, 3 FCC Rcd 5162 (1988), further asserts that the application merely states that the extension is unavoidable and thus does not provide the required "compelling explanation."

4. Section 22.923(c)(1) provides in pertinent part, "[a]pplications to extend 39 dBu contours beyond the borders of the RSA once the original RSA application is granted must be accompanied by a detailed engineering justification demonstrating the necessity for such extensions." *See* 47 C.F.R. §22.923(c)(1). In this case, with Burlington on the eastern boundary of the Iowa 4 RSA, we would expect the application to propose a cell site elsewhere in the RSA to avoid or minimize the signal extension into the Illinois 3 RSA, but it does not. Though it proposes a directional antenna oriented to the west at 270°, the application does not show that there is no technically feasible way to serve Burlington and that portion of the RSA in which it seeks to provide coverage without the extension beyond the RSA boundary. Further, the applicant provides no explanation regarding its intent not to provide service to the adjacent Illinois RSA especially in light of the population and the amount of traffic on U.S. Highway 34, which traverses the area of the extension into the Iowa 4 RSA. [3] Therefore, we find that the application does not contain an adequately detailed explanation as to why the extension is necessary.[4]

5. Accordingly, we find that Iowa's application fails to comply with Section 22.923(c)(1) of the rules. We therefore conclude that the proposed extension is not de minimis and permissible under our rules and policy for granting such extensions. Thus, the application is dismissed as defective pursuant to Section 22.20 of the rules.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED THAT the Petition to Deny filed by Illinois Independent RSA No. 3 General Partnership IS GRANTED.

7. IT IS FURTHER ORDERED THAT the Motion to Strike filed by Illinois Independent RSA No. 3 General Partnership against the Opposition filed by Iowa RSA No. 4 Limited Partnership IS GRANTED.

8. IT IS FURTHER ORDERED THAT the captioned application of Iowa RSA No. 4 Limited Partnership IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Illinois Independent filed a Motion to Strike Iowa's opposition arguing that it filed thirteen days late. The Public Notice announcing Iowa's application provided that oppositions must be filed within fifteen days of the petition. *See* Public Notice, Report No. CL-91-38, released November 19, 1990. We find that Iowa's filing was late and that no motion for extension of time

or request for waiver was filed to permit Iowa's submission. Accordingly, we will treat Iowa's opposition as informal comments.

[2] *See* Iowa Application, Exhibit 4. [underlining by Illinois Independent]

[3] The opposition reference to the description of "areas to the east" in the application as a transcription error is unpersuasive. *See* para. 4, *supra*. Even if we accept the statement in the application that the proposal will expand service in the vicinity of, and in other aspects to the west of, Burlington, in view of the extension's coverage of even small population areas, and also 4-6 miles of U.S. Highway 34 in the adjacent RSA, the applicant has not dispelled a strong suggestion of an intent to provide service in the extension area.

[4] We have taken into account the guidelines we have recently applied to evaluate extensions into RSAs. *William E. Northfield*, DA 91-313, (released March 19, 1991). These include extensions beyond MSAs or NECMAs. *Western Florida Cellular Telephone Corp.*, DA 91-463, (released April 12, 1991); *South Carolina Metronet, Inc.*, DA 91-168, (released February 19, 1991). For MSA and NECMA systems, the Commission established guidelines for 39 dBu contours in Section 22.903(a) of the rules and *Procedures Update*, 52 Rad. Reg. 2d (P&F) 725, (1982), *aff'd. Cellular Radio Service*, 56 Rad. Reg. (P&F) 2d 1583 (1984). *See* 47 C.F.R. §22.903(a). A minor extension beyond MSA or NECMA boundaries does not render an application defective if the application includes "a specific explanation of why it was necessary to engineer the particular cell(s) such that the 39 dBu contours could not be kept entirely within the MSA (or NECMA)." *Procedures Update*, at 726. We look first to see if the extension is minor, and then we evaluate the engineering explanation, considering various factors such as the terrain and population of the area in question, the shape of the adjoining boundaries and any extenuating engineering problems. *See e.g., Saco River Cellular Telephone Company*, 2 FCC Rcd 2009 (Mob. Serv. Div. 1987); *Metroplex Telephone Company*, 2 FCC Rcd 7301 (Mob. Serv. Div. 1987); and *GTE Mobilnet of South Texas Limited Partnership*, 4 FCC Rcd 1657 (Mob. Serv. Div. 1989). In the instant case, the extension amounts to 17 percent of the total cell area and appears to be relatively minor in size. *See e.g., Houston Cellular Telephone Company*, 5 FCC Rcd 7140 (Mob. Serv. Div. 1990) (19.8 percent cell extension); *Rhys G. Mussman, supra; South Carolina Metronet, Inc., supra*, (16.7 percent cell extension). However, even under the guidelines preceding Section 22.923(c)(1), Iowa's explanation in its application is not sufficiently specific. *See e.g., GTE Mobilnet of South Texas*, 4 FCC Rcd at 1657. *Cf., Round IV Cellular Applications*, 103 FCC 2d 171, 177-83 (1986), *aff'd mem.*, 813 F.2d 472 (D.C. Cir. 1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-142

In re Application of

ALGREG CELLULAR ENGINEERING File No. 10607-CL-P-307-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 307, Alabama 1 - Franklin

In re Application of

CRANFORD CELLULAR COMMUNICATIONS File No. 10611-CL-P-311-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 311, Alabama 5 - Cleburne

In re Application of

NEW-ERA CELLULAR TELE-COMMUNICATIONS File No. 10563-CL-P-332-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 332, Arkansas 9- Polk

In re Application of

BAY CELLULAR OF FLORIDA File No. 10754-CL-P-497-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 497 Mississippi 5 - Washington

In re Application of

FLORIDA CELLULAR File No. 10445-CL-P-505-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 505 Missouri 2 - Harrison

In re Application of

A-1 CELLULAR COMMUNICATIONS File No. 10454-CL-P-514-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 514 Missouri 11 - Moniteau

In re Application of

BRAVO CELLULAR File No. 10673-CL-P-579-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 579 North Carolina 15 - Cabarrus

In re Application of

TNT COMMUNICATIONS File No. 10233-CL-P-582-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 582 North Dakota 3 - Barnes

In re Application of

ALPHA CELLULAR File No. 10909-CL-P-586-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 586 Ohio 2 - Sandosky

In re Application of

CEL-TEL COMMUNICATIONS File No. 10912-CL-P-589-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 589 Ohio 5 - Hancock

In re Application of

EJM CELLULAR PARTNERS File No. 10567-CL-P-596-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 596 Oklahoma 1 - Cimarron

In re Application of

PINELLAS COMMUNICATIONS File No. 10808-CL-P-613-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 613 Pennsylvania 2 - McKean

In re Application of

CENTAUR PARTNERSHIP File No. 10720-CL-P-631-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 631 South Carolina 7 - Calhoun

In re Application of

SIGNAL CELLULAR COMMUNICATIONS File No. 10721-CL-P-632-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 632 South Carolina 8 - Hampton

In re Application of

A-1 CELLULAR COMMUNICATIONS File No. 10409-CL-P-661-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 661 Texas 10 - Navarro

In re Application of

EJM CELLULAR PARTNERS File No. 10116-CL-P-721-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 721 Wyoming 4 - Niobrara

In re Application of

TNT COMMUNICATIONS File No. 10678-CL-P-727-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 727 Puerto Rico 5- Ceiba

In re Application of

SATELLITE CELLULAR SYSTEMS File No. 10037-CL-P-318-A-89

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 318 Arizona 1 - Mohave, for station KNKN 268

In re Application of

JAYBAR COMMUNICATIONS File No. 10042-CL-P-323-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 323 Arizona 6 - Graham, for station KNKN 251

In re Applications of

DATA CELLULAR SYSTEMS File No. 10029-CL-P-345-A-88
File No. 07080-CL-MP-91

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 345 California 10 - Sierra, for station KNKN250

In re Applications of

CELLULAR PACIFIC File No. 10031-CL-P-346-A-88
File No. 06606-CL-MP-90
File No. 06688-CL-MP-90

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 346 California 11- El Dorado, for station KNKN 252

In re Application of

NORTH AMERICAN CELLULAR File No. 10066-CL-P-388-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 388 Idaho 1 - Boundary, for station KNKN 253

In re Applications of

ALPHA CELLULAR File No. 10318-CL-P-410-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 410 Indiana 8 - Brown, for station KNKN 340

For assignment of station KNKN340 in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 410, Indiana 8 RSA. File No. 10318-CL-P-410-A-88

In re Application of

EDISON CELLULAR File No. 10262-CL-P-485-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 485 Minnesota 4 - Lake, for station KNKN 281

In re Application of

ALEE CELLULAR COMMUNICATIONS File No. 10074-CL-P-555-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 555 New Mexico 3 - Catron, for station KNKN 271

In re Application of

CRYSTAL COMMUNICATION SYSTEMS File No. 10078-CL-P-606-A-88

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market 606 Oregon 1 - Clatsop, for station KNKN 309

MEMORANDUM OPINION AND ORDER ORDER DESIGNATING APPLICATIONS FOR HEARING AND ORDER TO SHOW CAUSE

Adopted: May 13, 1991; Released: May 29, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Cellular applications filed in 428 Rural Service Area (RSA) markets between July 1988 and January 1989 included two groups of applicants (West and East Coast Groups) who had applications prepared by The Cellular Corporation (TCC). Eighteen of these applicants have pending applications in markets in which they won the lottery, and 9 others received authorizations to construct and operate cellular systems. Between October 25, 1989 and December 26, 1989 the applicants filed amendments to their pending applications and those with authorizations filed notifications informing the Commission that they were part of an agreement styled as a "Mutual Contingent Risk Sharing Agreement" (the Agreements). For the reasons set forth below, we are designating the pending applications for hearing and ordering those with authorizations to show cause why their authorizations should not be revoked.

II. BACKGROUND

2. Algreg Cellular Engineering, Cranford Cellular Communications, New-Era Cellular Tele-Communcations, Bay Cellular of Florida, Florida Cellular,[1] A-1 Cellular Communications, Bravo Cellular, TNT Communications, Alpha Cellular, Cel-Tel Communications, EJM Cellular Partners, Pinellas Communications, Centaur Partnership and Signal Cellular Communications won lotteries for a number of markets.[2] Satellite Cellular Systems, [3] Jaybar Communications, Data Cellular Systems, Cellular Pacific, North American Cellular, Alpha Cellular, Edison Cellular, Alee Cellular Communications[4] and Crystal Communications Systems received authorizations for cellular systems in various markets.[5]

3. From October 25, 1989 through November 28, 1989 applicants filed amendments and those with authorizations informed the Commission they had entered into the Agreements.[6] On December 8, 1989, the Commission informed the public that amendments had been filed which stated that a number of parties had entered into the Agreements.[7] Throughout the month of December the applicants and those with authorizations filed amendments informing the Commission that they had rescinded the Agreements. On December 29, 1989 Applicants Against Lottery Abuses (the Association) filed a Petition to Dismiss or Deny the pending applications and a Request for Institution of Revocation Proceedings against the licensees. On January 4, 1990, a Petition to Deny or Designate for Hearing was filed by the Committee for a Fair Lottery (the Committee).[8] On January 17, 1990, the Committee filed a Request for an Order to Show Cause for revocation of the licenses for the licensees. The Commission established a consolidated filing schedule and procedural deadlines.[9] A large number of pleadings concerning the Agreements were filed.[10] *See* Appendix. The Commission severed a number of applicants from

this proceeding because they had erroneously been named by the Association as having been part of the Agreements.[11]

4. Applicants and those with authorizations (permittees) had relied on Columbia Security & Transfer, Inc. (Columbia) to establish their financial qualifications. The applicants filed amendments from November 5 through December 20, 1990, specifying Motorola or Northern Telecom Finance Corporation instead and revised their costs estimates. Various pleadings were filed about the Columbia Security financing and the financial amendments. *See* Appendix.

III. FACTUAL BACKGROUND AND DISPUTES

5. The Agreements provide that each signatory is granted rights to receive income or sales proceeds from any party to the Agreements whose application for an RSA cellular system is granted. Under the terms of the Agreements, three years after commencing commercial operation of any system subject to the Agreements, 50% of the profits from operations of that system are distributed to the signatory-licensee; the remaining 50% of the profits are distributed to the other signatories of the Agreements. Proceeds from any sale of a system licensed to a signatory of the Agreements are distributed in the same way. Each signatory to the Agreements is accorded the right to inspect the books and records of the licensee, the right to receive and review material contracts relating to any proposed sale of a system, and the right to regularly receive certified financial statements. The signatories also are accorded the right to enforce their contract by specific performance. The Agreements provide that they are subject to approval by the FCC and contain a provision for reforming the Agreements upon an FCC determination that the provisions do not comply with the rules.

6. The Agreements were conceived by TCC, the application preparer for all of the applications at issue in this proceeding. Some of the parties allege that TCC specifically conceived the Agreements as a method of establishing alliances, despite the fact that alliances had been prohibited by the Commission in the RSAs. This allegation is disputed by the applicants and licensees. The Agreements were drafted by William Franklin, attorney for TCC. Some of the parties also allege that applicants were told to keep the existence of the Agreements secret and not reveal their existence to the FCC. This allegation is also disputed.

7. Two separate Agreements were created for two separate groups of applicants, which we term the East Coast and West Coast Groups. The two Agreements contain minor differences.[12] The risk sharing concept and the Agreements were discussed through conference calls, at seminars and through letters. The extent of these discussions and whether an attorney was present at some or all of these discussions are disputed. Both groups argue that they entered into the Agreements in good faith, without an intent to violate the Commission's rules, and in reliance on advice of counsel that the Agreements were legal.

8. Members of the East Coast Group alleges that they did not see or sign the Agreement itself, but rather signed an execution document which, by its terms, purported to bind the signatories to the Agreements. The binding effect of signing the Execution Document is also in dispute. The members of the East Coast Group do acknowledge that they had approved of the concept of risk sharing, however. The Execution Document for Mutual Contingent Risk Sharing Agreement was signed by the East Coast group members (23 general partnerships) on or about September 16, 1988; each party in this group has a 2.38% interest. The West Coast group members (14 parties, 12 general partnerships and two individuals) signed the Agreement on September 22, 1988; each minority right of participation in this group equals 3.85%.

9. The East Coast group avers that all of the partnerships filing the joint opposition have agreed to terminate the Agreement.[13] The West Coast Group states that their Agreement was terminated in 1989, after the existence of the Agreements were disclosed to the Commission.[14]

10. Algreg is an individual proprietorship owned by Neely, the president of TCC since July 1987. Alpha Cellular alleges that it was never a party to the Agreement, but they do admit that their partners had agreed to the concept of risk sharing in writing in October 1988. The signature of Mildred Williams, a partner of Alpha Cellular, appears on the Agreement, but Alpha Cellular argues that Mrs. Williams does not remember signing the Agreement, and, in any event, had no authority to sign on behalf of the partnership.[15]

IV. LEGAL ANALYSIS

11. In adopting the RSA licensing rules, one of the Commission's main goals was to deter speculative applications from being filed and to ensure that the lottery process was fair for all applicants.[16] Against this backdrop, we analyze whether the Agreements violate any or all of the following rules: Section 22.33 which prohibits partial settlement agreements among nonwireline RSA applicants; Section 22.921 which prohibits multiple ownership interests in competing nonwireline RSA applications; Section 22.922 which prohibits the transfer of interests in pending applications. In addition, we analyze whether applicants who entered the Agreements falsely certified their applications in violation of Section 22.923(b)(7) of the rules, or failed to keep their applications substantially complete in violation of Section 1.65 of the rules.

A. Partial Settlements

12. Section 22.33(b)(2) categorically prohibits partial settlements among nonwireline applicants in Rural Service Areas (RSAs). In adopting this rule the Commission stated:

> By "partial settlement," we mean any arrangement among fewer than all of the applicants in a market that provides any reciprocal interests in the applications of the parties to the arrangement. The term includes the so-called "alliance agreements" whereby each participant in the alliance agrees that if it wins a particular market it will retain at least 50.1% of the application and the other members of the alliance will each obtain a maximum interest of 0.99% in the winning application.

Third Report and Order, 4 FCC Rcd 2440, 2447 n.3 (1988). The Commission also stated: "Given our previous experience, if we continue to allow partial settlements for nonwireline carriers, we believe that large numbers of

applications will be filed by people who are not *bona fide* applicants but who seek to become parts of settlement groups or alliances for speculative purposes." *Id.* at 2441.

13. The Agreements violate §22.33(b)(2) of the rules. The Agreements constitute an arrangement among fewer than all of the applicants in the markets, under which the parties to the Agreements enjoy reciprocal interests in each others' applications. Each would receive a portion of the profits and sales proceeds of any cellular system built, operated and sold by any of the other parties to the Agreement. The Agreements' clear purpose and effect is to improve an applicant's ability to participate in a winning application. We disagree with Pepper & Corazzini's argument that the word "interest" in this section should be interpreted only to mean ownership interest.

B. Multiple Ownership

14. Section 22.921(b)(1) provides that "no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same Rural Service Area, including an interest of less than one percent." In adopting this rule, the Commission stated:

> The current 1% exception has been used by application promoters and applicants as the basis for forming post-filing, pre-lottery partial settlements or "alliances". We tentatively concluded that the ability to sell, trade or transfer minority interests in cellular licenses encouraged the speculative filing of applications and abuses of our cellular licensing process.

Third Report and Order, 4 FCC Rcd at 2440. This rule is to promote fairness in the lottery process by eliminating the ability of applicants to skew the lottery by improving their chances to win a lottery.

15. We find that the Agreements violate §22.921. The word "ownership" in this rule is a general term in recognition of the fact that ownership can vary in degree and kind in different contexts. The term "owner" is a general term and is afforded a liberal construction when interpreted by courts. "Owner" has been defined as the person in whom property is beneficially vested, or the person who has the occupation or control or enjoyment of it. "Owner" describes one who has dominion over or an interest in or claim upon property, which may be less than absolute and unqualified title. An equitable owner is defined as one who does not have legal title but is entitled to the beneficial interest, *e.g.* a "chose in action," a monetary note or other contract, or damages for breach of covenant. 73 C.J.S. Property §§22, 25 (1983). The term includes the right to receive contract payments under an arrangement for sale of real property, shares of corporate stock or certificates of corporate stock. 63 Am. Jur. 2d Property §26 (1984).

16. The right to share in profits in a partnership is akin to an equity security which is generally regarded as entailing an ownership interest.

> Equity securities represent ownership rights which . . . entitle the holder to a right to participate in surplus profits, and upon dissolution, to share in those assets that remain after all debts have been paid.

6a W. Fletcher, *Cyclopedia of the Law of Private Corporations* at 5, Section 2635 (Rev. Ed. 1989).[17] In a partnership context, the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business. *See* Uniform Partnership Act §7(4).

17. In these Agreements, the signatory has a right to a share of the profits of a business. The Agreements give the partners the right to copy and inspect the records and books of the licensee; receive and review any material contracts the licensee might enter into regarding the sale of the system; receive certified financial statements regularly for each system; and enforce rights under the Agreements by specific performance. The interests created by the Agreements are similar to non-voting shareholder interests in a corporation.[18] Therefore, even a restrictive interpretation of the rule leads to the conclusion that the interests created here are prohibited ownership interests.

18. The Agreements represent exactly the type of abuse that the Commission outlawed in adopting the cross-ownership ban. In these cases, the lotteries were skewed: each signatory could receive benefits even if its application did not win a lottery.

19. We do not agree with Pepper & Corazzini that the fact that the interests are contingent or involve money to be paid in the future prevents us from finding a rule violation.[19] The rule on its face does not contain an exclusion for contingent or future interests. In fact, given the purpose behind the rule, all types of ownership interests, including contingent or future interests, were prohibited.[20] In addition, most ownership interests contemplate that money owing will be paid some time in the future, as with dividend payments associated with stock ownership or partnership interests in a business. Therefore, we conclude that, as a matter of law, these interests are ownership interests within the meaning of Section 22.921(b).

C. Alienation of Interest

20. We also find that parties who entered the Agreements after their applications had been filed violated §22.922 which prohibits the transfer of interests in cellular applications. These applicants transferred interests in their pending applications in violation of the rule. The transfer of interests includes any form of alienation, including option arrangements and agreements, as well as equity and debt placement plans. *See also Third Report and Order*, 4 FCC Rcd 2440, 2443 (1988).

D. False Certification & Failure to Disclose

21. Section 22.923(b)(7) requires an applicant to certify that the application is complete, complies with the rules and that there are no understandings or agreements not disclosed in the application which grant anyone else a direct or indirect ownership interest. Those applicants who signed the Agreements prior to filing their applications in any market and failed to disclose the agreements falsely certified their applications. An issue will be designated to determine the circumstances of the false certification. In evaluating the impact of this violation the Administrative Law Judge (ALJ) may consider the parties' intent. *See* Conclusions, *infra*.[21]

22. Section 1.65 of the rules requires an applicant to keep their applications substantially complete and to report any significant information to the Commission shortly after such information comes to light.[22] This section

requires applicants who entered into one of the Agreements after their applications were filed to inform the Commission of this fact. Those who failed to do so within a reasonable time frame violated this rule. Accordingly, a Section 1.65 issue will be designated for hearing. The ALJ may consider intent[23] in assessing the impact of this violation.[24] *See* Conclusions, *infra*.

E. Attempt to Void the Agreements

23. Once the existence of the Agreements was disclosed to the Commission, but before any action was taken by the Commission, the parties scrambled to undo what had apparently been done. These actions took place after the lotteries had been held in the affected markets. We find that these efforts to rescind the Agreements are insufficient to avoid sanctions for the apparent violations of the rules. To hold otherwise would set precedent for applicants to commit rule violations without check, since the only sanction would be requiring reformation of the Agreements.[25] The attempted rescission came too late in the process to be given any consideration.[26]

V. OTHER ISSUES

A. Familial Relationships

24. Petitioners also argue that several applicants are in privity or have familial relationships and therefore, violate the prohibition on having interests in more than one application per market. Family or close personal relationships alone do not create a presumption of control for purposes of real party in interest considerations. *Virginia Communications, Inc.*, 62 Rad. Reg. 2d (P&F) 1001, 1010 (1987). *See Florida Cellcom*, 2 FCC Rcd 7044 (Com. Car. Bur. 1987). Therefore, since there are insufficient allegations to support the contentions, we will not specify a real party in interest issue.

B. Letter Perfect

1. RSA #307

25. Petitioner Buckhead contends that Neely's application for Alabama 1, RSA 307 was defective under the letter perfect standard because there was a facial inconsistency between the name of the applicant (Algreg Cellular Engineering) and the person signing the application (Gregory Neely). Moreover, petitioner contends that Neely also certified at item 10, Form 401 that he was an individual applicant. The application does not violate the letter perfect standard. In this case the application was properly signed by the individual proprietor, Neely, in accordance with §1.743(a) of the rules. Moreover, clerical errors may be corrected by curative amendment. *See e.g. Florida Cellcom*, 2 FCC Rcd 1764 (Mob. Ser. Div. 1987), *recon. denied* 2 FCC Rcd 7044, 7045 (Com. Car. Bur. 1987) (allowed the correction of filing status from corporation to sole proprietorship).

2. RSA #497

26. Buckhead alleges that the person who signed Bay Cellular's application Schedule A (Form 401) and the transmittal sheet, Maurice O'Connell, as the general partner, was not identified in the ownership Exhibit (Ex. 1 application). According to Buckhead this violates the letter perfect standard, citing *Central Illinois Cellular Ltd. Partnership*, 2 FCC Rcd 436,437 (Com. Car. Bur. 1987). In the alternative, Buckhead contends the application should be dismissed for a patently false certification.

27. Bay Cellular responds that O' Connell has been a general partner since Bay Cellular's formation. Bay Cellular alleges that two pages of the application were inadvertently omitted from the application as it was filed with the Commission, although the pages were there when O'Connell signed. Inadvertent errors can be cured by curative amendment. *Pactel Cellular*, 4 FCC Rcd 4561, 4562 (1989). We agree with Bay Cellular that there was a clerical mistake in its application, evident from the face of the application. Therefore, we find that the application was properly signed by one of the general partners and did not violate the letter perfect standard. *See Edward W. St. John*, 5 FCC Rcd 1192 (1990).

C. Alpha Cellular Additional Alleged Violations

28. Buckhead argues that Alpha Cellular has made prohibited oral *ex parte* presentations to the Commission in that it advised the staff of record that it had facts in its possession that were relevant to the risk-sharing inquiry. The offer to provide information was not an *ex parte* presentation. Moreover, the communication was disclosed to the other parties to the proceeding in a pleading filed by Alpha Cellular. Since the other contact went only to procedural requirements for filing the Section 1.65 Amendment, no violation of the *ex parte* rules occurred. In any event, the amendment was placed on public notice.[27] *See Rules Concerning Ex Parte Communications*, 2 FCC Rcd 3011 (1987), *recon.* 2 FCC Rcd 6053 (1987). *See also*, Public Notice No. CL 89-210, Mimeo No. 3573 (July 11, 1989).

VI. COLUMBIA SECURITY FINANCING

A. Factual Background

29. On July 20, 1990, the Commission set aside grants to seven other applicants who are not signatories to the Agreements (hereinafter the Pro-Max group) in order to investigate whether the applicants' firm financial commitments issued by Columbia Security and Transfer, Inc. (Columbia) complied with the requirements of Section 22.917 of the rules.[28] All the applicants who are signatories to the Agreements also used Columbia financing to demonstrate their financial qualifications.

30. The applications of all these applicants and permittees contained firm financial commitment letters issued by Columbia. The applications also indicated that the applicants were "existing depositors" of Columbia. Columbia's principal, Louis P. Mirando (Mirando), later pleaded guilty in Canada to 63 counts of fraud and admitted defrauding United States companies and financial institutions by issuing over $125 million in certificates of deposit which were worthless because no money was ever deposited with Columbia to cover the commitments.[29] A Petition for Review on Commission's Own Motion and a Petition to Deny were filed by the Association against the Pro-Max group.[30] On July 27, 1990, the Mobile Services Division (MSD) initiated an investigation. The MSD requested additional information concerning the Pro-Max's group contact with and subsequent choice of Columbia as their lender. Subsequently, the Committee and the Association filed pleadings alleging the same issues against the applicants and permittees who signed the Agreements.

The Association and the Committee aver that the applicants and permittees lack financial qualifications or misrepresented facts to the Commission.

31. All of these applications were prepared by TCC. TCC relied on Columbia for all of its financial showings. In their responses the applicants and permittees aver that they complied with the firm financial commitment rule when they filed their applications. They allege that the Commission itself had recognized Columbia as a financial institution. Applicants and permittees also aver that they did not know about Mirando's criminal acts until the filing of the petition by the Association. In addition, both applicants and permittees state that the statements in their financial exhibits that they were depositors of Columbia were mistakes. Moreover, they argue that they supplied Columbia with their financial statements in order for Columbia to ascertain their creditworthiness, paid a commitment fee and TCC supplied Columbia with business plans for each applicant.

B. Legal Analysis

32. Section 22.917(c) of the rules sets forth the requirements for RSA applicants to demonstrate their financial qualifications. This section requires that non-wireline applicants include a firm financial commitment letter with their application. An application is unacceptable for filing if it does not include a firm financial commitment. *See Progressive Cellular III B - 2*, 5 FCC Rcd 2772 (1990). In addition, Section 22.917(c)(5) provides that the firm financial commitment letter be obtained from a state or federally chartered bank or savings and loan association, another recognized financial institution or the fiscal arm of an equipment supplier. The firm financial commitment letter must contain a specific statement (1) that the lender has examined the financial condition of the applicant, including audited financial statements where applicable, and has determined that the applicant is creditworthy; and (2) that the lender's willingness to enter into the commitment is based solely on its banking relationship with the applicant.

33. On July 3, 1989, in *Data Cellular Systems*, 4 FCC Rcd 5345 (Com. Car. Bur. 1989) the Bureau found that Columbia was a qualified financial institution based on a balance sheet submitted and representations made by Columbia to the Commission. There were no facts in the record which would contradict Columbia's statements. That decision was never appealed and is now final. Mirando's guilty plea in a Canadian court was not made until February 28, 1990 and the Commission did not learn of this plea until July 1990. The *Data Cellular* decision was apparently decided based on gross misrepresentations by Columbia. Therefore, the factual and legal conclusions with respect to Columbia's status as a *bona fide* financial institution contained in *Data Cellular Systems* are overruled.

34. We conclude that the Columbia financial commitment letters on their face comply with Section 22.917(c) of the rules. There is no indication in the record that the applicants or permittees at the time they filed their applications, had any reason to question Columbia's legitimacy or viability as a financial institution. All of these applicants and permittees indicate that TCC suggested the use of Columbia to provide a firm financial commitment letter. They indicate that TCC acted as an intermediary between the applicants and permittees and Columbia and there was no direct contact by the applicants and permittees with Columbia. In addition, the applicants and permittees documented that TCC obtained financial information from the applicants and permittees, which TCC said was submitted to Columbia in order for Columbia to evaluate the creditworthiness of the applicants.[31] Columbia apparently had provided financing for some MSA applicants, which applications were granted in the ordinary course.

35. There is nothing in the rules that requires applicants to guarantee the viability of the financial institution which provides applicants with a firm financial commitment. However, applicants who have reason to question the representations of an application preparer or the financial institution relied upon and specified in the application would be held accountable to represent truthfully their compliance with Section 22.917(c) requirements. There is no evidence to support any allegation that this was the situation in these cases. Furthermore, these applicants and permittees have now found substitute firm financial commitments.[32] Therefore, we will not designate a financial or misrepresentation issue on these facts.

36. We reject the Association's argument that the financial amendments were untimely filed. Given that these applicants and permittees were already involved in this proceeding regarding the legality of the Agreements, which delayed further processing of the applications, we find that no harm resulted from any delays from the late filing of the amended financial showings. In addition, we have reviewed the financial showings of the applicants and permittees, and find that the amended letters, including the costs estimates, do comply with Section 22.917(c) of the rules.

VII. REVOCATION OF GRANTED LICENSES

37. A number of applications involving partnerships who were signatories to the Agreements have already been granted. Based on our legal conclusions concerning the pending applications finding that some rules violations may have occurred, we will initiate revocation proceedings against the authorization holders who were parties to the Agreements. The same issues designated for hearing are also applicable to these partnerships holding authorizations.

38. Section 312(a) of the Communications Act states that the Commission may, upon issuing an order to show cause, revoke any station license or construction permit because of misrepresentations to the Commission or conditions coming to the attention of the Commission which would warrant refusing to grant a license or permit on an original application. 47 U.S.C. §312(a).[33] This Order includes such a show cause order.

VIII. CONCLUSIONS

A. Applicants

39. We have concluded that the Agreements v
Section 22.33 which prohibits partial settlement
ments among nonwireline RSA applicants. In ad
the Agreements violate Section 22.921 which pro
multiple ownership interest in competing nonwi
RSA applications. Furthermore, the Agreements
tered into after the filing of an application, violate S
22.922 which prohibits the transfer of interests in pe
applications. Therefore, any applicant who entere

such an agreement has filed a defective application or rendered its application defective and accordingly the applications must be dismissed.[34] Section 309(d) of Communications Act requires a hearing when there are substantial and material questions of fact preventing a determination that the grant of an application would be in the public interest. *See Astroline Communications Company Limited Partnership v. FCC*, 857 F. 2d 1557 (D.C. Cir. 1988). In this proceeding, the only question to be resolved is whether the individual applicants have, in fact, entered into the Agreements or otherwise taken actions which made them parties to the risk sharing provisions. Accordingly, we will specify an issue inquiring into each applicants' actions with regard to these Agreements. In addition, violations of Sections 1.65 (failure to report) and 22.923 (false certification) were discussed above. However, if it is concluded with regard to any of the applicants that they never entered into the Agreements then there is no basis to consider those possible rule sections. On the other hand, if it is found that they are bound by the Agreements then their applications should be denied.

B. Licensees/Permittees

40. Concerning the permittees, if they entered into the Agreements, it could reflect on their qualifications to retain their authorizations, but, standing alone, it is not necessarily grounds for revocation. The hearing will include inquiry into all the facts and circumstances of the permittees actions or involvement with regard to the Agreements. This will allow the ALJ to evaluate their conduct and determine whether they are qualified to retain their authorizations.

IX. ORDERING CLAUSES

41. Wherefore, IT IS ORDERED, pursuant to Section 309 and 312 of the Communications Act of 1934, as amended, that the captioned applications and licenses ARE DESIGNATED FOR A CONSOLIDATED HEARING.

42. IT IS FURTHER ORDERED, pursuant to Section 309 of the Communications Act of 1934, as amended, that the applications are designated for hearing on the following issues:

(1) To determine all the facts and circumstances surrounding the applicant's involvement with the Agreements.

(2) To determine, based on the evidence adduced in issue (1) above, which if any of the applicants entered into the Agreements.

(3) To determine, based on the evidence adduced above, which if any of the applications should be denied.

43. IT IS FURTHER ORDERED, pursuant to Section 312 of the Communications Act of 1934, as amended, that Satellite Cellular Systems, Jaybar Communications, Data Cellular Systems, Cellular Pacific, North American Cellular, Alpha Cellular, Edison Cellular, Alee Cellular Communications and Crystal Communications Systems SHOW CAUSE why their licenses SHOULD NOT BE REVOKED and this inquiry will focus on the following matters:

(1) To determine all the facts and circumstances surrounding the permittees involvement in the Agreements.

(2) To determine, based on the evidence adduced in (1) above, which if any of the permittees entered into the Agreements.

(3) To determine whether the permittees who entered into the Agreements falsely certified their applications (Section 22.923) or violated Section 1.65 of the rules with regard to their applications when they were pending.

(4) To determine whether Alee Cellular lacked candor in failing to reveal to the Commission an alien general partner or that it changed the nature of its partnership.

(5) To determine whether Alee Cellular complied with the requirements of Section 310(b) of the Communications Act and Section 22.4 of the rules.

(6) To determine, based on the totality of the evidence adduced pursuant to 1, 3, 4 and 5 above, whether the permits of any of the captioned permittees should be revoked.

44. IT IS FURTHER ORDERED THAT the hearing shall be held at a time and place and before an Administrative Law Judge to be specified in a subsequent Order.

45. IT IS FURTHER ORDERED THAT the Petitions to Deny, Requests for Institution of Revocation Proceedings and pertinent Comments are GRANTED to the extent indicated above and in all other respects are DENIED.

46. IT IS FURTHER ORDERED THAT the Petition for Reconsideration filed by Florida Cellular IS DENIED.

47. IT IS FURTHER ORDERED THAT the Joint Motion to Strike and for Declaration that Cole, Raywid & Braverman is not a Party Hereto IS DENIED.

48. IT IS FURTHER ORDERED THAT Applicants Against Lottery Abuses, The Committee for a Fair Lottery, Buckhead Cellular Communications Partnership, Cole Raywid and Braverman, Pepper & Corazzini and the Chief, Common Carrier Bureau, are made parties to this proceeding. The applicants licensees and the parties may avail themselves of an opportunity to be heard by filing written notices of appearance under Section 1.221 of the Commission's rules within 20 days of the mailing of this order by the Secretary. The notice and other expedited procedures of Section 1.822(b) shall not apply in this case.

49. IT IS FURTHER ORDERED, pursuant to Section 309(e) of the Communications Act, that the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicants. We are assigning the burdens of going forward with the evidence and proof on the applicants because they have particular knowledge of the specific events at issue in this proceeding.

50. IT IS FURTHER ORDERED, pursuant to Section 312 (c) of the Communications Act, that the burden of proceeding with the introduction of evidence regarding revocation of licenses shall be upon the Commission.

51. The Secretary shall cause a summary of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

APPENDIX

Comments on The Agreement:

Buckhead Cellular Communications Partnership (Buckhead) -Petition to Dismiss or Deny the application of Bay Cellular of Florida (Bay Cellular) - February 23, 1990. Bay Cellular filed an Opposition to Petition to Dismiss or Deny.

Miller Communications and Skywave Partners, Inc. and Cole Raywid and Braverman (Cole) - Comments against the Agreement - March 2, 1990.

Buckhead - Petition to Dismiss or Deny Applications and for Issuance of Show Cause Orders - March 2, 1990.

The Association -Opposition - March 6, 1990. Buckhead - Informal Objection to the assignment of station KNKN 340 from Alpha Cellular to Omega Cellular. The Committee - Petition to Deny - March 9, 1990. Alpha Cellular -Opposition to Informal Objection, Opposition to Petition to Deny and an Opposition to Opposition to Application for Assignment.

Buckhead - Supplement to Petition to Dismiss or Deny Applications and for Issuance of Show Cause Orders and a Motion for Leave to File Supplemental Pleading - March 27, 1990 (against Alpha Cellular's applications). Alpha Cellular - Comments on an Unauthorized Pleading filed by Buckhead - April 6, 1990.

A-1 Cellular Communications, Alee Cellular Communications, Bay Cellular, Cel-Tel, Centaur Partnership, Cranford Cellular Communications, Edison Cellular, EJM Cellular Partners, Florida Cellular, Jaybar Communications, New-Era Telecommunications, Pinellas Communications, and TNT Communications. (RSA Partnership) or (East Coast Group) - Joint Opposition - April 2, 1990.

Bravo Cellular, Signal Cellular Communications and Neely (West Coast Group) - Joint Comments - April 2, 1990.

Pepper & Corazzini - Comments - April 2, 1990.

Cellular Pacific, Crystal Communications Systems, Data Cellular Systems and North American Cellular (Pacific/permittees) - Joint Opposition - April 2, 1990.

Satellite Cellular Systems - Opposition -April 2, 1990.

Alpha Cellular - Comments on the Mutual Contingent Risk Sharing Agreement - April 3, 1990.

Alpha Cellular, Buckhead, Cole, Neely, the Committee, East Coast Group, the Association and Pepper & Corazzini - Reply comments - April 18, 1990.

The Association - Supplement to Reply Comments - April 30, 1990. The RSA Partnership - Response to Supplement to Reply Comments - May 14, 1990. Neely - Motion to Strike the Association's Supplement - June 14, 1990. The Association-Opposition to Motion to Strike-June 26, 1990. Alpha Cellular-Comments on the Association's Opposition to Motion to Strike-June 28, 1990. Neely-Reply to Opposition to Motion to Strike --July 22, 1990.

Comments on Financial Showings and Amendments:

The Association - Supplement to Reply Comments. The East Coast Group - Response to Supplement to Reply Comments. Neely - Reply to Supplement to Reply Comments. Comments Upon Proferred Amendments.

The Association - Further Supplement to Reply Comments. The Committee - Comments upon Proferred Amendments. The East Coast group - Response to Further Supplement to Reply Comments. The Association - Reply.

FOOTNOTES

[1] Florida Cellular's application was granted on November 20, 1989. By letter the grant was set aside. *See* Letter from Chief, Mobile Services Division, FCC, to Howard Barr, December 7, 1989. *See also Grant of RSA Application Rescinded*, Report No. CL-90-60 (Mob. Ser. Div. December 8, 1990). On January 8, 1990, Florida Cellular filed a petition for reconsideration of this action. The Committee for a Fair Lottery and Buckhead Cellular Communications Partnership opposed the petition for reconsideration. The arguments in the petition for reconsideration are the same as those advanced by parties arguing that the Agreements are illegal. Therefore, based on our disposition herein of the substantive arguments we are denying the petition for reconsideration.

[2] Market 307 (Alabama 1 - Franklin), 311 (Alabama 5 - Cleburne), 332 (Arkansas 9 - Polk), 497 (Mississippi 5 - Washington), 505 (Missouri 2 - Harrison), 514 (Missouri 11 - Moniteau), 579 (North Carolina 15 - Cabarrus), 582 (North Dakota 3 - Barnes), 586 (Ohio 2 - Sandosky), 589 (Ohio 5 - Hancock), 596 (Oklahoma 1 - Cimarron), 613 (Pennsylvania 2 - McKean), 631 (South Carolina 7 - Calhoun), 632 (South
lina 8 - Hampton), 661 (Texas 10 - Navarro), 721 (Wyomi
Niobrara) and 727 (Puerto Rico 5 - Ceiba). Centaur Partn
filed a Contingent Petition for Waiver of §22.922 on Ap
1990. Given the disposition of this application in this h
designation order, we do not act on this petition.

[3] The application of Satellite Cellular Systems, File No. 10108-CL-P-674-A-89, for Market 674, Utah 2 - Morgan has already been dismissed as defective on other grounds. *See Satellite Cellular Systems*, 5 FCC Rcd 1758 (1990), *aff'd*, *Satellite Cellular Systems v. FCC*, No. 90-1204 (D.C. Cir. November 23, 1990). Therefore, it is not made part of this designation order.

[4] Alee informed the Commission that a 4% interest in Alee had been transferred before the lottery from Shafi M. Sharifan (a non-U.S. citizen) to Amir R. Riahi (a U.S. citizen). At the time the application was filed on August 12, 1988 the interest was held by the non-U.S. citizen. After the fact Alee requests a waiver of §22.922. *See* Letter from Sue W. Bladek to Donna R. Searcy (April 30, 1990). This request has not yet been acted on.

[5] Market 318 (Arizona 1 - Mohave), 323 (Arizona 6 - Graham), 345 (California 10 - Sierra), 346 (California 11 - El Dorado), 388 (Idaho 1 - Boundary), 410 (Indiana 8 - Brown) 485 (Minnesota 4-Lake), 555 (New Mexico 3 - Catron) and 606 (Oregon 1 - Clatsop), respectively. Cellular Pacific also has two modification applications pending (File No. 06606-CL-MP-90 and 06688-CL-MP-90) and Data Cellular Systems has one modification application pending (File No. 07080-CL-MP-91). Comments against the modifications were filed by the Committee for a Fair Lottery alleging the applications cannot be granted until the proceeding concerning the Agreement is resolved. Since the contentions in these petitions are the same as those raised in this proceeding, the modification applications have been made part of this proceeding. Alpha Cellular (Alpha) also has a *pro forma* assignment application pending against which a petition to deny has been filed which raises the same issues as the proceeding concerning the Agreement. For this reason the assignment application for market No. 410 is consolidated in this proceeding.

[6] On November 28, 1989, Alpha Cellular stated it had been mentioned as a party to the Agreement but disavowed having been a party to the Agreement. *See* Letter from Alan Y. Naftalin to Chief, Mobile Services Division, FCC (November 28, 1989).

[7] *See* Disclosure of RSA Mutual Contingent Risk-Sharing Agreements, Report No. CL-90-57, Mob. Ser. Div. December 8, 1989. *See also* Mutual Contingent Risk Sharing Agreements, Report No. CL-90-74, Mob. Ser. Div. January 4, 1990 (made all the proceedings restricted including those markets where applications had been granted).

[8] We find that The Committee, The Association, and Cole, Raywid & Braverman have standing in this proceeding because they are or comprise a group of mutually exclusive applicants in the markets where mutually exclusive applications are pending. *See e.g.* Sierra Club v. Morton, 405 U.S. 727; O'Shea v. Littleton, 414 U.S. 488 (1974); Office of Communications of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966); National Broadcasting Co., 37 FCC 2d 897, 898 (1972).

[9] *See* Establishment of Procedural Dates for Commenting on Mutual Contingent Risk Sharing Agreements, Report No. CL-90-92 (January 31, 1990).

[10] Section 22.33 prohibits partial settlement agreements between nonwireline applicants in RSAs. Section 22.921 prohibits multiple ownership interests in nonwireline applications filed in the same RSA. In addition, Section 22.922 prohibits the transfer of interests in pending applications. Petitioners contend that the Agreements violate these rules.

[11] *See* Action on Request for Commission Inquiry Terminated and Parties Severed From Mutual Contingent Risk Sharing Agreement Proceeding, Rep. No. CL-90-172 (May 9, 1990).

[12] There are six textual differences between the Agreements: (1) Definition of "Eligible System" - the East Coast Agreement referred to "Filing Tiers" and the West Coast Agreement referred to an attached Exhibit A (RSA Ranking); (2) The definition of "Filing Tier" only appears on the East Coast Agreement; (3) The definition of "Pro Rata" differs in the two Agreements; (4) Section 4.5 appears only in the West Coast Agreement; (5) The governing law for the East Coast Agreement is District of Columbia, while that of the West Coast is California; (6) Exhibit A was only attached to the West Coast Agreement. The East Coast Group applied in all 428 RSAs while the West Coast Group applied in 250 RSAs.

[13] According to the East Coast group, the Agreement by its terms can only be terminated by unanimous consent of its signatories. Many signatory partnerships which did not win lotteries were not inclined to terminate the Agreement and for that reason, the East Coast Agreement has not been terminated.

[14] Alpha Cellular states that it did not participate in the rescision, since it does not consider itself a party to the Agreement.

[15] Alpha states that it does not contend at this time that the signature was forged, and acknowledges that it looks like Mrs. Williams signature.

[16] *See generally*, Rural Cellular Service (First Report and Order), 60 Rad. Reg. 2d (P&F) 1029 (1986); *modified*, 2 FCC Rcd 733 (1987); *further modified*, 2 FCC Rcd 3366 (1987); 3 FCC Rcd 4403 (1988); 4 FCC Rcd 5272 (1988); and 4 FCC Rcd 4464 (1989). Rural Cellular Service (Second Report and Order), 2 FCC Rcd 2306 (1987), *modified*, 4 FCC Rcd 5377 (1989). Rural Cellular Service (Third Report and Order), 4 FCC Rcd 2440 (1988). *See generally*, Cellular Communications Systems, 86 F.C.C. 2d 469 (1981), *modified*, 89 F.C.C. 2d 571 (1982), *appeal dismissed sub nom.* United States v. FCC, No. 82-1526 (D.C. Cir. 1983); Cellular Lottery Order, 98 F.C.C. 2d 175 (1984), *modified*, 101 F.C.C. 2d 577 (1985), *further modified*, 59 Rad. Reg. 2d (P&F) 407 (1985), *aff'd in part and rev'd in part*, Maxcell Telecom Plus v. FCC, 815 F. 2d 1551 (D.C. Cir. 1987).

[17] The Supreme Court has held that a "security" and thus an ownership interest, will exist where the "scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975). There is no legal distinction as to the type of consideration given, whether it be money or any other item of value (such as the right to a share of a licensee's profits). Some courts have found that limited partnership interests formed for the purpose of owning and operating cable television systems were "securities", and therefore, ownership interests. Siebel v. Scott, 725 F. 2d 995 (5th Cir. 1984).

[18] Although we agree that the Agreements permit the lottery winner to retain some degree of independence in prosecuting an application and that an authorized licensee retains the discretion whether to sell or build a system, these factors are insufficient to overcome the legal conclusion that the Agreements entailed ownership interests within the meaning of the cross-ownership prohibition.

[19] We reject the argument that the interests were in the authorizations granted and not in the application itself. Although any payout was to be delayed until after an authorization was granted, the interest itself is in the application which won the lottery because filing the applications and obtaining a permit based upon the filed applications was the originating *quid pro quo* for entering into the Agreements in the first place. An element of a contract which is critical is: "it involves an undertaking or commitment that something shall or shall not be done in the future . . . " John Murray, Murray on Contracts, §2 at 4 (2nd Rev. Ed. of Grismore on Contracts). A promise to pay profits is an implied condition in a contract. *See* 6 S. Willinston, Willinston on Contracts §887 (3rd. ed.). In this case

the interest was in the enterprise constituted at the time of signing the Agreements. The holder of the interest expects to share in the profits of the enterprise, which profits are determined by the efforts of others. Therefore, the interests were ownership interests. *See* Siebel v. Scott, *supra* at n.17. In *Siebel* the court held that where the limited partners did not plan or desire to participate in the operation of the cable television sytem, but rather viewed themselves as investors, paid their money and relied on the managerial skills of the general partner to bring profit, the limited partnership interests were securities, and therefore ownership interests. Likewise, the Commission has stated that the sharing of profits is an incidence of ownership. *See* Intermountain Microwave, 94 Rad. Reg. 2d (P&F) 983 (1963). *See also* Guidelines for Settlements and Changes in Ownership in Cellular Systems, 59 Rad. Reg. 2d (P&F) 1450, 1452 (Com. Car. Bur. 1986); Guidance Regarding Questions of Real Party in Interest and Transfers of Control for Cellular Applications in Markets Beyond Top 120, 1 FCC Rcd 3. (Mob. Ser. Div. 1986).

[20] We also reject the argument that the term ownership interest be limited to "attributable interests" as defined in the Commission's broadcast attribution rule. The attribution rules were not mentioned in the context of adopting Section 22.921(b). *See* Cellular Lotteries, 98 F.C.C. 2d 175, 218 (1984); 101 F.C.C. 2d 577, 599, 600 (1985).

[21] Petitioners also argue that the applicants and licensees violated Section 22.13(a) of the rules by failing to disclose the real parities in interest behind their applications. While it is true that the parties should have disclosed the Agreements and signatories, there are insufficient allegations to support that the Agreements constituted real party in interest violations.

[22] *See e.g.*, Radio Station Kaye, 7 Rad. Reg. 2d 313 (1966). *See generally*, §73. 3613.

[23] Failure to report does not jeopardize a licensee's basic qualifications where the reporting failures are not predicated on an intent to conceal information. Valley Broadcasting Co., 66 Rad. Reg. 2d 600 (Rev. Bd. 1989).

[24] Alee Cellular has informed the Commission that it had an alien general partner at the time it filed its application. This interest was transferred after the application had been filed. An application with an alien general partner violates Section 310 of the Act. *See* reconsidered *in part*, 1 FCC Rcd 12 (1986). This application should not have been granted for this reason. Therefore, we are designating an alien ownership issue against this permittee. The Commission was never informed of this ownership change or the fact that Alee had an alien general partner. Therefore, an issue with respect to Alee's apparent misrepresentation will also be designated.

[25] For the same reason, we do not believe the provision in the Agreements rendering the Agreements void if found to violate FCC rules to be of significance. This is a standard clause inserted into contracts to give lawyers an argument to avoid imposition of sanctions. Such a clause is never given effect until after a finding by the Commission of a violation. Therefore, the clause has little practical effect in vitiating a violation of the Commission's rules and should be afforded no significance when weighing the appropriate sanction to be imposed. For instance, a voidable contract is still a contract. J. Murray, Murray on Contracts §7 (2nd Rev. Ed. of Grismore on Contracts). At the time they signed the Agreements the rule violations occurred. Therefore, they cannot avoid the consequences of their acts by voiding the Agreements. This case is distinguishable from other cases where offensive clauses are severable from Agreements. *See* Ellis Thompson, 3 FCC Rcd 3962, *recon. den.*, 4 FCC Rcd 2599 (1989); Advanced Mobile Phone Service Inc., 93 FCC 2d 683, 693-94, n.24 (1983) and Twentieth Holdings Corp. 4 FCC Rcd 4052 (1989). In this case the very essence of the Agreements violated our rules.

[26] Amendments to cure substantive defects are not permitted. *See* Rem Communications, 3 FCC Rcd 3705 (1988). In addition, compliance at a later date does not mitigate earlier violations. *See* Chesapeake Broadcasting Corp., 2 FCC Rcd 252, 253, n.11 (1987); Cate Communication Corp., 60 Rad. Reg. 2d (P&F) 1386 (1986); Vernon Broadcasting Inc., 60 Rad. Reg. 2d (P&F) 1275 (1986); United Television Co. of New Hampshire, 32 Rad. Reg. 2d (P&F) 44, 49 (1974). *But see* F.B.C. Inc., 65 Rad. Reg. 2d 263 (M. Med. Bur. 1988) (option contract rescinded before Commission intervention, along with other factors did not reflect adversely on licensee qualifications).

[27] We also find that Alpha Cellular did not have to file for a waiver of Section 22.922 because the ownership change reported in its Section 1.65 amendment occurred prior to filing its application. In addition, Alpha Cellular was permitted to submit a substitute financial showing pursuant to Section 22.917(c) because its captioned application was its second lottery win.

[28] Pro-Max Communications, 5 FCC Rcd 4836 (1990).

[29] *See* Her Majesty the Queen v. Mirando, File No. DC 411/89 (Dist. Ct. Ontario, Cananda, Feb. 28, 1990).

[30] On October 11, 1990, the Association filed a motion to dismiss both petitions based on the responses of the applicants and a negotiated settlement.

[31] Based on the above, we find that the language in the financial exhibits stating the applicants were depositors in Columbia is not significant.

[32] We have no facts on these applicants or permittees which would raise a real party in interest issue so no real party in interest issue is designated for these applicants. In addition, we do not believe it would be fruitful to further investigate the Agreements signatories' knowledge concerning the viability of Columbia, given the responses to the Bureau inquiry.

[33] Separate notice of this designation order is not required under 5 U.S.C. § 558(c) since this hearing involves alleged instances of willful misconduct.

[34] These rule violations require dismissal. *See* Section 22.20 and n. 26, *supra*. The Common Carrier Bureau has dismissed applications for rule violations. *See, e.g.*, Progressive Cellular III B- 3, DA 91-68 (Mob. Ser. Div. January 31, 1991); Cincinnati SMSA Limited Partnership, DA 91-71 (Mob. Ser. Div. January 31, 1991). Therefore, evidence of mitigation is not pertinent.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB COMMUNICATIONS GROUP, INC. File No. I-T-C-90-188

For Blanket Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Establish Channels of Communication Between the United States and the Union of Soviet Socialist Republics and Certain Eastern European Countries via the Intersputnik Satellite System for the Provision of Private Line Services Not Interconnected with the Public Switched Network

TRT/FTC COMMUNICATIONS, INC. File No. I-T-C-91-019

Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Acquire and Operate Facilities in the Intersputnik Satellite System for the Provision of International Private Line Services Between the United States and the Union of Soviet Socialist Republics Not Interconnected with the Public Switched Network

AMERICAN TELEPHONE AND TELEGRAPH COMPANY File No. I-T-C-90-035

For Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Establish and Operate Satellite Channels of Communication Between the Roaring Creek, Pennsylvania Earth Station and Points in the Union of Soviet Socialist Republics via the Intersputnik Satellite System

AMERICAN TELEPHONE AND TELEGRAPH COMPANY File No. CSG-90-012-P/L

Application to Construct and Operate an 18.3-meter C-band Earth Station Antenna and Associated Ground Communications Electronics Equipment at the International Satellite Earth Station Complex at Roaring Creek, Pennsylvania to communicate with the Intersputnik satellite system

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: May 17, 1991; Released: May 29, 1991

By the Chief, Common Carrier Bureau:

1. The Commission has before it applications filed by the American Telephone and Telegraph Company (AT&T),[1] IDB Communications Group, Inc. (IDB) and TRT/FTC Communications, Inc. (TRT/FTC) requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish and operate channels of communications between the United States and the Union of Soviet Socialist Republics (U.S.S.R.) via the Intersputnik satellite system for the provision of private line service.[2] The Commission also has under consideration a related application filed by AT&T pursuant to Title III of the Communications Act to construct and operate additional facilities at its Roaring Creek, Pennsylvania international communications satellite earth station complex and to use the new facilities for the provision of private line services. The applications were placed on public notice. No comments were received concerning the private line service granted herein.

I. THE APPLICATIONS

2. TRT/FTC is an international common carrier which has received authorization to provide regularly authorized services between the U.S. and the U.S.S.R. TRT/FTC states that it recently entered into an agreement with Users of Automated Control Systems of Telecommunications Agencies (ACSTA), a U.S.S.R. public association licensed by the Ministry of Postal Services and Telecommunications of the U.S.S.R., to provide information systems and international private line services in the U.S.S.R. TRT/FTC notes that its agreement with ACSTA contemplates the provision of high-speed digital and other private line services between the U.S. and the U.S.S.R. via both INTELSAT, where appropriate and available, and via Intersputnik. In the instant application, TRT/FTC requests authority to acquire and operate up to two digital half-circuits, each with a nominal capacity of 2.048 Megabits per second (Mbps), in the Intersputnik satellite system and associated earth station and extension facilities in the United States for the provision of international private line services between the United States and the U.S.S.R. which will not interconnect with the public switched networks. Depending on the demand for these services, TRT/FTC states that it will either lease earth station facili-

ties of other U.S. carriers which are licensed to operate with Intersputnik, or provide service through its own earth station for which it would seek appropriate authority under Title III of the Communications Act. TRT/FTC references the discussions contained in the AT&T and IDB applications as evidence that existing INTELSAT space segment facilities and terrestrial facilities between the U.S. and the U.S.S.R. are insufficient to meet the anticipated demand for private line services.

3. IDB is an international common carrier currently authorized to provide a range of international services, including INTELSAT Business Service, television and program audio services between the U.S. and U.S.S.R and certain Eastern European countries. IDB states that the rapid pace of change in the U.S.S.R. and Eastern European countries in the past few years has led to a skyrocketing demand for high quality telecommunications services between the U.S. and Eastern Europe. [3] Specifically, IDB notes that the growth of East-West commerce has greatly increased the demand of U.S. and other business enterprises for reliable corporate communications between the U.S. and Eastern Europe. IDB states that existing INTELSAT facilities between the U.S. and Eastern Europe are inadequate to satisfy this demand because of insufficient Eastern European ground facilities to access INTELSAT and insufficient transponder capacity for certain services at certain times. IDB believes that use of Intersputnik will permit private line East-West corporate communications to expand rapidly since there will be substantially reduced capital investment demands on the Soviet and Eastern European telecommunications ministries and on private industry. In this regard, IDB refers to Intersputnik earth stations and technical equipment already installed and operating throughout the U.S.S.R. and Eastern Europe.[4] IDB also cites the shortage of "hard currency" in the U.S.S.R. as making it impossible for U.S.S.R. telecommunications entities to satisfy fully the demand for additional facilities through INTELSAT or transatlantic cable systems. Initially, IDB requests authority to provide a maximum of five T-1 (1.544 Mbps) circuits in 1991, with 20% annual growth thereafter. IDB does not foresee significant economic harm resulting to INTELSAT since it is creating a market where none previously existed for the provision of private line service.

4. AT&T is a dominant international common carrier which provides International Message Telephone Service (IMTS) and private line service between the U.S. and the U.S.S.R. primarily via the INTELSAT system. In support of its proposed use of the Intersputnik satellite system to provide private line service, AT&T cites the benefits of improving East-West relations and the potential size of the U.S.S.R. market. According to AT&T, these factors are creating a rapidly increasing demand for new and improved telecommunications between the U.S. and the U.S.S.R. AT&T states that the use of Intersputnik will: 1) increase route diversity which will result in greater network reliability and resiliency; 2) make service expansion more feasible by reducing the hard currency demand for the Ministry of Communications (MOC) associated with payment to INTELSAT for space segment charges; and 3) promote international comity. Initially, AT&T requests two 2.048 Mbps streams, each consisting of thirty 64 kilobit per second (kbps) circuits, for U.S./U.S.S.R. private line service during the first year of operation via Intersputnik, and three 2.048 Mbps streams during the second year of operation. AT&T does not anticipate any significant economic harm to INTELSAT arising from its limited use of the Intersputnik system. Under its agreement with Comsat, AT&T notes that it will continue to place a specified percentage of its growth circuits, which are leased under long-term arrangements, on INTELSAT facilities. In addition, AT&T expects that the stimulation generated by the use of Intersputnik will cause an overall increase in AT&T's growth circuits.

5. AT&T also requests authority to construct and operate an 18.3-meter C-band earth station at Roaring Creek, Pennsylvania to communicate on the transmitting frequency band 5925-6425 MHz and the receiving frequency band 3700-4200 MHz with the Intersputnik Statsionar-4 satellite located at 14 degrees West Longitude for the provision of private line communications. In the original application, AT&T states that the operations of the earth station will not exceed that which was originally coordinated by Comsat for the Roaring Creek complex and which was granted by the Commission on June 4, 1982 under File No. CSG-81-015-P. That coordination limited operations to the satellite arc from 15 to 90 degrees West Longitude due to a potential interference problem with terrestrial facilities of Western Union. AT&T's amendment of April 3, 1991, indicates that new coordination material for the earth station was sent on October 11, 1990 to all known carriers, applicants, or coordinating companies which may affect or be affected by the operation of the proposed earth station. AT&T's frequency coordinator certifies that successful coordination was completed on March 28, 1991.

II. DISCUSSION

6. The subject applications propose the use of non-INTELSAT space segment facilities to provide international private line service not interconnected with the public switched network. For the most part, U.S. policy with respect to the use of non-INTELSAT facilities for the provision of public international telecommunications services has been established under the Transborder and Separate Systems policies. Under the Transborder policy, use of domestic satellites to international points is permitted in those instances where either (1) INTELSAT cannot provide the service or (2) it would be clearly uneconomical or impractical to use the INTELSAT system.[5] Under the Separate Systems policy, separate international satellite systems may be established provided that they are restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with the public-switched message networks (except for emergency restoration service).[6]

7. The U.S. Transborder and Separate Systems policies are based on the policy underpinnings of the Communications Satellite Act of 1962 (Satellite Act), as amended, 47 U.S.C. §§701-744. The Satellite Act provides for U.S. participation and support of the INTELSAT global commercial satellite system. Although the United States is a Party to the INTELSAT Agreement and is committed to a strong, viable INTELSAT system, the Satellite Act clearly does not require or contemplate the sole use of INTELSAT to satisfy U.S. requirements for international satellite services. It specifically provides for the creation of additional satellite systems if " . . . required to meet the unique governmental needs or if otherwise required in

the national interest." 47 U.S.C. §701(d).[7] The Executive Branch determines whether the use of non-INTELSAT facilities is in the national interest.[8]

8. In the matter before us, the State Department has provided the Commission with the conditions upon which we can authorize use of the Intersputnik system for private line service consistent with U.S. foreign policy and the national interest.[9] The State Department supports the authorization of private line service as proposed in the applications. However, because of its concern that commercial satellite systems cannot effectively compete on the basis of price with non-commercial systems, the State Department requests that the authorizations be granted subject to review after six months by the Commission and the Executive Branch. The State Department believes that the six month review will enable a future examination of potential migration of traffic from commercial systems, as well as a review of any intervening market mechanisms which might obviate any existing concerns. The State Department has also informed the Commission that U.S. obligations under the INTELSAT Agreement have been met since INTELSAT has favorably consulted the provision of non-switched services via the Intersputnik system.[10]

9. We also determine here that the applicants have satisfied the public interest standard of the Communications Act of 1934, as amended, 47 U.S.C. §214 and 47 U.S.C. §301 *et seq.*, and grant their applications subject to, *inter alia*, the conditions set forth by the Executive Branch. The applicants propose to use Intersputnik facilities for the provision of private line services not interconnected with the public switched network between the U.S. and the U.S.S.R. and Eastern European countries which are not members of INTELSAT.[11] The applicants cite the periodic unavailability of INTELSAT space segment facilities as well as a shortage of INTELSAT-compatible ground station facilities. These facts have been well documented. The Commission has previously authorized the use of the Intersputnik system to provide news coverage of major events in Eastern Europe based, in part, on the unavailability of INTELSAT space segment.

10. In addition, Comsat's recent application to participate in INTELSAT's procurement of additional capacity was based, in part, on increased traffic demand in the Atlantic Ocean Region (AOR) and projected shortfalls in both C-band and Ku-band capacity in the region.[12] With respect to C-band capacity, Comsat stated that there were only three 36 MHz equivalent transponders available for transatlantic traffic, of which only one zone transponder could be used for outbound U.S. traffic. Comsat also noted that in the event all INTELSAT VI satellites were successfully launched, available C-band capacity would increase in the 1991-1992 time frame to seven 36 MHz equivalent transponders, distributed as 0.5 East/West, two West/East zone transponders and 4.5 global transponders. However, Comsat cautioned that in the event of even one INTELSAT VI launch failure, there would only be one zone and 1.5 global transponders available. On March 14, 1990, the attempted launch of the second INTELSAT VI (F-3) satellite was unsuccessful and the satellite was stranded in an unstable low earth orbit. Comsat was ultimately authorized to participate in INTELSAT's procurement of the additional capacity in the form of the INTELSAT-K satellite, an all Ku-band satellite that does not alleviate INTELSAT's concerns with respect to need for additional C-band capacity, particularly in light of the launch failure of the INTELSAT VI (F-3).[13] The Intersputnik satellite located at 14 degrees West Longitude operates on C-band frequencies only. We also note that with respect to the availability of INTELSAT-compatible ground segment facilities, there is a limited number of earth stations in Eastern Europe that are capable of communicating with the INTELSAT system. In light of these circumstances, we find that the limited use of Intersputnik facilities proposed herein, subject to the conditions suggested by the State Department, will serve the public interest.

11. In light of the State Department's planned six month review to determine the potential for migration of traffic from commercial systems, these authorizations will be conditioned on the State Department's and the Commission's review and their findings.[14] Should the State Department and the Commission determine after their review that the use of the Intersputnik system by the applicants has not resulted in significant migration of traffic from commercial systems and should continue, each applicant will have to file an application to acquire and operate additional capacity in the Intersputnik system beyond the total number of circuits authorized herein.[15] If the Commission is notified by the State Department that the continued use of the Intersputnik system is no longer in the national interest, then these authorization will be subject to cancellation.

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that the application of AT&T (File No. I-T-C-90-035) IS GRANTED IN PART, and the applications of IDB (File No. I-T-C-90-188) and TRT/FTC (File No. I-T-C-91-019) ARE GRANTED, and the applicants are authorized to establish channels of communications between the U.S. and the U.S.S.R. via the Intersputnik satellite system for the provision of private line service not interconnected with the public switched network.[16]

13. IT IS FURTHER ORDERED that IDB is also authorized to provide private line service not interconnected with the public switched network between the U.S. and the following Eastern European countries: Poland, Hungary, Albania, Czechoslovakia, Romania, and Bulgaria.

14. IT IS FURTHER ORDERED that the initial total number of circuits authorized herein is as follows: IDB--five T-1 (1.544 Mbps); AT&T--two 2.048 Mbps; and TRT/FTC--two 2.048 Mbps.

15. IT IS FURTHER ORDERED that the continued effectiveness of these authorizations is conditioned on the outcome of the review after six months by the State Department and the Commission as specified in paragraph 11, *supra*.

16. IT IS FURTHER ORDERED that IDB and TRT are authorized to provide private line services authorized herein using existing earth stations in the U.S. authorized to communicate with the Intersputnik satellite system or future earth stations which may be so authorized. Should these applicants wish to construct their own earth station facilities to provide these services, an appropriate application under Title III of the Communications Act will be required.

17. IT IS FURTHER ORDERED that the application of AT&T, File No. CSG-90-012-P/L, IS GRANTED IN PART and AT&T IS HEREBY AUTHORIZED to con-

struct and operate an 18.3-meter C-band international transmit/receive earth station on the premises of its existing communications satellite earth station complex at Roaring Creek, Pennsylvania to communicate with the Intersputnik satellite located at 14 degrees West Longitude for the provision of private line services not interconnected with the public switched network.[17]

18. IT IS FURTHER ORDERED that before completion of earth station equipment installation and facility activation, AT&T shall provide the Commission with a summary of equipment actually installed.

19. IT IS FURTHER ORDERED that each applicant shall submit monthly reports detailing the number and capacity of private line circuits in use over the Intersputnik system. The reports shall also set forth each carrier's number and capacity of private line circuits in use over each communication system for the countries served by the Intersputnik system. These reports shall be filed no later than the 20th day of each month and shall include the required information for the previous month.

20. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T's application initially requested authority to provide switched voice service as well as private line service via the Intersputnik system. Following a May 14, 1990 letter from Laurence S. Eagleburger, Deputy Secretary of State, to Chairman Alfred C. Sikes, which indicated that the use of the Intersputnik system would be subject to the restrictions imposed on U.S. separate satellite systems and that the State Department would support the Commission's consideration of an amended AT&T application for use of Intersputnik for services not interconnected with the public-switched network, AT&T requested that we bifurcate consideration of its Section 214 and Title III applications and only proceed with the portions of the applications which seek authority to provide private line service not interconnected with the public switched network. That portion of AT&T's application which requests authority for switched voice service will be considered at a later date.

[2] IDB also requests authority to provide private line service between the U.S. and certain Eastern European countries that are not members of INTELSAT.

[3] IDB proposes to provide service to the following Eastern European countries: Poland, Hungary, Albania, Czechoslovakia, Romania, and Bulgaria.

[4] By upgrading these facilities, IDB states that it will be able to provide cost-effective private line communications in a very short time frame to many Eastern European cities, most of which do not have INTELSAT earth station facilities. Thus, IDB believes that the use of Intersputnik will obviate, at least in the short run, the need to construct costly new INTELSAT earth station facilities, which may not be built in the near future because the level of traffic may not justify the cost of construction and operation.

[5] Transborder Satellite Video Services, 88 FCC 2d 258 (1981) (Transborder I). *See also* American Satellite Co., 88 FCC 2d 178 (1981), and Satellite Business Systems, 88 FCC 2d 195 (1981).

[6] Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046 (1985), reconsideration, 51 Fed. Reg. 17631 (May 14, 1986), further reconsideration, 1 FCC Rcd 439 (1986).

[7] Additionally, Congress has declared it to be U.S. policy " . . . to make available to consumers a variety of communications satellite services utilizing space segment facilities of INTELSAT and any additional such facilities which are found to be in the national interest . . . " and which are technically compatible with and avoid significant economic harm to the INTELSAT system. Public Law 99-93, 99 Stat. 425, Sec. 146, August 16, 1985.

[8] Letter from James L. Buckley, Under Secretary of State, to Mark Fowler, Chairman, Federal Communications Commission (July 23, 1981); Letter from George P. Shultz, Secretary of State, and Malcolm Baldridge, Secretary of Commerce, to Mark S. Fowler, Chairman, Federal Communications Commission (November 28, 1984).

[9] Letter from Ambassador Bradley P. Holmes, Department of State, to Chairman Alfred C. Sikes, Federal Communications Commission (November 21, 1990).

[10] Letter from Steven W. Lett, Deputy Director for Satellite and Cable Policy, Department of State, to George Li, Chief, International Facilities Division, Common Carrier Bureau, Federal Communications Commission (December 19, 199).

[11] Although Romania has recently become a member of INTELSAT, IDB maintains that use of Intersputnik is warranted since most of the ground station facilities in that country operate with the Intersputnik system.

[12] Comsat application File No. CSS-89-004, p. 5.

[13] *Communications Satellite Corporation*, 5 FCC Rcd 5952 (1990). In that proceeding, IDB noted that on one occasion it was unable to provide data and private-line voice communications via INTELSAT between the U.S. and Poland and Hungary during President Bush's visit to those countries and had to use the PAS-1 satellite. On other occasions, IDB stated that it had to use the Intersputnik system when it was unable to obtain suitable capacity from INTELSAT.

[14] *See supra* para. 8.

[15] *See* International Carrier Policies, 102 FCC 2d 812 (1985); *recon. denied*, 60 R.R. 2d 1435 (1986).

[16] This authorization is not to be construed as permitting the provision of any service between earth stations located within the United States.

[17] *See* note 15, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 36 of
the Commission's Rules and
Establishment of a Joint Board

REPORT AND ORDER

Adopted: April 25, 1991; Released: May 28, 1991

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. The Commission established the Universal Service Fund (USF) to promote the nationwide availability of telephone service at reasonable rates.[1] Toward this end, USF assistance permits some local exchange carriers (LECs) to reduce local rates by recovering additional expenses from the interstate services they provide. Accordingly, USF assistance is provided in the form of an expense adjustment that shifts a portion of total expenses from the state to the interstate jurisdiction in high-cost study areas, *i.e.*, those in which the jurisdictionally unseparated average loop cost exceeds 115 percent of the national average.

2. As administrator of the USF, the National Exchange Carrier Association (NECA) annually determines which study areas are eligible and what assistance amount each is to receive. NECA makes this determination using a multi-step procedure pursuant to Part 36, Subpart F, of our rules. One important step in this prescribed procedure is the calculation of an unseparated average loop cost for the LEC industry and for individual study areas.[2] To ensure that NECA properly includes all loop-related overhead expenses and taxes in this calculation, our rules require NECA to allocate unseparated Corporate Operations Expenses and Operating Taxes between loop and nonloop operations based on the loop/nonloop apportionment of net investment. [3]

3. We sought comment on a proposed revision of this allocation procedure in the *Notice* [4] released on November 22, 1988. Specifically, we proposed a bifurcated approach in which the allocation of Corporate Operations Expenses would be based on gross investment and that of Operating Taxes would be based on net investment. In that notice, we also referred this matter to the Federal-State Joint Board in CC Docket 80-286 for a recommendation. After studying the comments filed by seven interested parties, the Joint Board released its *Recommended Decision* [5] on December 17, 1990. It recommended that the rules be amended to allocate both the overhead expenses and taxes based on gross investment, the allocation factor NECA is currently using under waiver. For the reasons set forth below, we hereby adopt this recommended amendment.[6]

II. JOINT BOARD RECOMMENDATIONS

4. *Treatment of Corporate Operations Expenses.* The Joint Board agreed with our proposal to base the allocation of Corporate Operations Expenses on gross investment. It agreed that cost causation would be better reflected by an allocation factor based on gross investment rather than net investment, because the former is insensitive to depreciation reserve levels, whereas the latter is not. The Joint Board felt such insensitivity is desirable because Corporate Operations Expenses generally are unrelated to a number of factors, such as salvage estimates and equipment life, that affect depreciation reserve levels.

5. *Treatment of Operating Taxes.* The Joint Board stated that, because income represents a rate of return on net rather than gross investment, net investment likely is the more precise basis of allocation for the income-based portion of Operating Taxes. The Joint Board nonetheless concluded that gross investment would be a more appropriate basis of allocation for Operating Taxes as a whole, because such taxes primarily consist of property and gross receipts taxes. Neither of these taxes, the Joint Board explained, is closely related to income or directly affected by depreciation reserve levels.

6. The Joint Board conceded that the most accurate treatment of Operating Taxes probably is a bifurcated approach in which the income-based taxes are allocated based on net investment and the other taxes are allocated based on gross investment. Even so, the Joint Board declined to recommend this approach, noting that it would require Class B carriers (carriers with annual operating revenue of less than $100 million) to disaggregate Operating Taxes between taxes based on income and taxes based on other factors. Such a requirement, it stated, would impose a requirement on the smaller carriers that the Commission deliberately avoided, when adopting the Part 32 accounting rules, to lessen the administrative burden on such carriers. The Joint Board further noted, based on the results of two recent industry studies, that the substitution of net investment for gross investment as the basis of allocation for Operating Taxes has no significant effect on the overall amount of USF assistance.[7] The Joint Board therefore concluded that gross investment should be used to allocate both Operating Taxes and Corporate Operations Expenses. In addition, it recommended several minor language changes in our rules to clarify these cost development procedures.

III. DISCUSSION AND CONCLUSION

7. We agree with the Joint Board that, because USF assistance is provided as an adjustment to separated expenses, and because expenses are generally separated based on the apportionment of gross investment, the same plant factor should be used to allocate the overhead expenses and taxes unless a compelling reason is shown for doing otherwise. We also agree the record makes no such showing. We recognize the record does indicate that net investment might be more appropriate than gross investment as a basis of allocation for the income-based portion of Operating Taxes. Yet, we are persuaded by the Joint Board that any additional precision that might be ob-

tained from adopting a bifurcated treatment of Operating Taxes would be too small to merit the added complexity of using two different factors to allocate overhead expenses and taxes. Accordingly, we concur with the Joint Board's conclusion that all such costs should be allocated based on gross investment. Finally, we also are persuaded that the rules applicable to this cost development procedure would be substantially clarified by the minor language changes that the Joint Board recommends.

8. We therefore adopt all of the Joint Board's recommendations regarding these prescribed procedures.[8] We also adopt, as our own, the Joint Board's reasoning in support of its recommendations. We believe the adoption of these separations revisions will further our goal of promoting effective and adaptive regulation for communications, while eliminating regulations that are unnecessary or inimical to the public interest.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, That the recommendations of the Federal-State Joint Board, ARE ADOPTED.

10. IT IS FURTHER ORDERED, that the amendments to Part 36 of the Commission's rules set forth in Appendix A of this Report and Order ARE ADOPTED effective 30 days after being published in the Federal Register. These actions are taken pursuant to Sections 1, 4(i) and (j), 205, 221(c), 403, and 410 of the Communications Act, as amended, 47 U.S.C. Secs. 151, 154(i) and (j), 205, 221(c), 403 and 410.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 36 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 36 continues to read:

Authority: 47 U.S.C. Secs. 151, 154(i) and (j), 205, 221(c), 403 and 410.

2. The title of Subpart F is revised to read as follows:

Subpart F--Universal Service Fund

3. Sec. 36.601 is amended by revising paragraph (a) to read as follows:

Sec 36.601 General

(a) The Universal Service Fund is derived from an expense adjustment that shall be computed in accordance with this Subpart F. This adjustment shall be added to interstate expenses and deducted from state expenses after expenses and taxes have been apportioned pursuant to Subpart D.

* * * * *

4. SEC. 36.621 IS Amended by revising the heading and paragrphs (a) and (a)(4) to read as follows:

Sec. 36.621 Study Area Total Unseparated Loop Cost

(a) For the purpose of calculating the expense adjustment, the study area total unseparated loop cost equals the sum of the following:

* * * * *

(4) Corporate Operations Expenses, Operating Taxes and the benefits and rent portions of operating expenses, as reported in §36.611(a)(5) attributable to investment in C&WF Category 1.3 and COE Category 4.13. This amount is calculated by multiplying the total amount of these expenses and taxes by the ratio of the unseparated gross exchange plant investment in C&WF Category 1.3 and COE Category 4.13, as reported in §36.611(a)(1), to the unseparated gross telecommunications plant investment, as reported in §36.611(a)(6).

5. The heading of Sec. 36.622 is revised to read as follows:

Sec. 36.622 National and Study Area Average Unseparated Loop Costs

FOOTNOTES

[1] *See generally*,Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 96 FCC 2d 781 (1984).

[2] *See* 47 C.F.R. § 36.622.

[3] *See* 47 C.F.R. § 36.621.

[4] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, *Notice of Proposed Rule Making*, 3 FCC Rcd 6767 (1988).

[5] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, *Recommended Decision and Order*, 5 FCC Rcd 7578 (1990).

[6] A more complete history of this proceeding is provided in the *Notice at* paras. 3-7.

[7] *See Recommended Decision* at para. 20.

[8] The new Part 36 rules incorporating all the adopted recommendations are attached as Appendix A.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-59

In the Matter of

Wyoming Public Safety Plan

ORDER

Adopted: May 20, 1991; Released: May 28, 1991

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On October 26, 1990, Region 46 (Wyoming) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region. On March 1, 1991, Wyoming filed revisions to the plan, based on conversations with the Commission's staff.

2. The Wyoming plan was placed on Public Notice for comments on March 12, 1991, 56 FR 11555 (3-19-91). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Wyoming and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Wyoming.

4. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Wyoming IS ACCEPTED. Furthermore, licensing of the 821-824/866-869 MHz band in Wyoming may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Ozark Beepers, Inc. File No. 23661-CD-P/L-1-88

For a Construction Permit to
construct a PLMS Base Station
on 152.54 MHz at Aurora, Mo.

Rex D. Chambers File No. 27303-CD-P/L-1-88
d/b/a Chambers
Electronic Service

For a Construction Permit to
construct a PLMS Base Station
on 152.54 MHz at Aurora, Mo.

MEMORANDUM OPINION AND ORDER

Adopted: May 20, 1991; Released: May 28, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Ozark Beepers, Inc. (Ozark) filed an application for frequency 152.54 MHz in the Public Land Mobile Service in Aurora, Missouri which appeared on Public Notice as acceptable for filing on April 27, 1988. Rex Chambers d/b/a Chambers Electronic Service (Chambers) filed an application for frequency 152.54 MHz in the Public Land Mobile Service at Aurora, Missouri on July 22, 1988. Chambers filed a Petition to Deny against the Ozark application on October 7, 1988. Ozark filed a Petition to Deny against the Chambers application on September 9, 1988. Responsive pleadings were filed by both Ozark and Chambers.

II. DISCUSSION

2. *Chambers' Application*: The Chambers application, which would have been electrically mutually exclusive with the Ozark application, was filed on July 22, 1988, more than 60 days after the Public Notice of the acceptance for filing of the Ozark application. Accordingly, pursuant to Section 22.31(b), the Chambers application is cut-off and is being returned as defective. *Mid - Missouri Mobilefone*, 61 R.R.2d 20, 24 (1986); *See also*, 47 C.F.R. § 22.31(d). Since we have returned the Chambers application as defective, Ozark's Petition is moot, and we need not deal with it further.

3. *Ozark's Application*: The Petition to Deny filed by Chambers against the Ozark application was filed more than 120 days after the Public Notice listing the acceptance for filing of the Ozark application. Accordingly, the Petition was untimely, and it is denied. The Ozark application requested frequency 152.54 MHz. The Public Notice properly listed the requested frequency. In the Ozark application, a typographical error appeared twice, listing the requested frequency as 154.54 MHz.[1] Ozark filed a minor amendment and corrected the typographical errors.

4. An application in the Public Land Mobile Service will be granted if it is complete and is filed in accordance with the Commission's rules and demonstrates that a grant would be in the public interest, convenience and necessity. 47 C.F.R. § 22.32. The typographical errors in Ozark's application were minor and were corrected by amendment. In addition, the 152.54 MHz frequency was properly listed on Public Notice, and the error was of no decisional significance.

5. We find the typographical errors in the Ozark application to be minor and that the applicant was legally, technically, financially and otherwise qualified to be a Commission licensee. Further, we find a grant of the Ozark application to be in the public interest and that it would promote the efficient provision of service to the public.

III. ORDERING PARAGRAPHS

6. Accordingly, IT IS ORDERED THAT the Application of Ozark Beepers, Inc., file number 23661-CD-P/L-01-88, for frequency 152.54 MHz IS GRANTED; and

7. IT IS FURTHER ORDERED THAT the Petition to Deny filed by Chambers IS DENIED as untimely filed; and

8. IT IS FURTHER ORDERED THAT the Chambers Application, file number 27303-CD-P-88, for frequency 152.54 MHz is DISMISSED as Defective; and

9. IT IS FURTHER ORDERED THAT the Petition to Deny filed by Ozark is DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] The application listed the correct frequency everywhere else throughout the application.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

U.S. SATELLITE CORPORATION — File No. I-T-C-91-040

For authority under Section 214 of the Communications Act of 1934, as amended, to establish channels of communication to provide transborder services between the U.S. and Canada and Mexico and from the U.S. to Latin American/Caribbean locations and to provide service between the U.S. and all countries the PAS satellite system is authorized to serve.

ORDER AND AUTHORIZATION

Adopted: May 13, 1991; **Released: May 28, 1991**

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned application filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that its grant will serve the present and future public convenience and necessity.

2. Accordingly, IT IS ORDERED that the application of U.S. Satellite, File No. I-T-C-91-040, IS GRANTED and:

a. U.S. Satellite Corporation is authorized to provide transborder services consulted under Article XIV(d) of the INTELSAT Agreement between the U.S. and Mexico and Canada via all U.S. domestic satellites as well as the Morelos and Anik satellite systems; and via all U.S. domestic satellites from the U.S. to Latin American/Caribbean locations consistent with Attachments 1 and 2; and

b. U.S. Satellite Corporation is authorized to establish channels of communication between existing and future earth stations owned and operated or leased by U.S. Satellite Corporation in the U.S. and those countries which the the Pan American Satellite system is authorized to serve for the provision of international television, video and audio services, not interconnected with the public switched network. U.S. Satellite is also authorized to establish channels of communications not to exceed twenty-four 64 Kbps equivalent circuits to each country between existing and future earth stations owned or leased by U.S. Satellite Corporation for the provision of private line service not interconnected with the public switched network.[1]

3. IT IS FURTHER ORDERED U.S. Satellite Corporation is restricted in its communications with the PAS-1 satellite to the provision of capacity through the sale or long-term lease (at least one year) of transponder capacity for communications not interconnected with the public switched message networks (except for emergency restoration services).

4. IT IS FURTHER ORDERED that authorization to use the PAS-1 satellite is subject to Commission jurisdiction over the use of all space segment within the PAS system to ensure compliance with the restrictions placed on the operation of separate satellite systems.

5. IT IS FURTHER ORDERED that the authority granted herein for the applicant to establish channels of communication between existing and future earth stations and the PAS-1 and INTELSAT satellites does not dispense with the requirement that all such earth stations must be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

6. This authorization is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *See* Alpha Lyracom, d/b/a Pan Amercian Satellite, 4 FCC Rcd 8649 (1989). PAS-1 is authorized to provide service via its Ku-band capacity between the United States and the Bahamas, Denmark, Federal Republic of Germany, France, Ireland, Italy, Luxembourg, Monaco, the Netherlands, Portugal, Sweden, and the United Kingdom. PAS-1 is authorized to provide service via its C-band capacity between the United States and Argentina, Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, and Peru.

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XIV(d)

Satellites

AURORA (SATCOM V)
COMSTAR D-4
CONTEL ASC-I
CONTEL ASC-II
GALAXY I
GALAXY II
GALAXY III
GALAXY IV-R
GALAXY V-R
GALAXY VI (WESTAR VI-S)
GSTAR I
GSTAR II
GSTAR III
SATCOM IR
SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
SATCOM K-2
SBS I
SBS II
SBS III
SBS IV
SBS V
SBS VI
SPACENET I
SPACENET II
SPACENET III
TELSTAR 301 (TELSTAR 3A)
TELSTAR 302
TELSTAR 303
WESTAR IV
WESTAR V

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATIONS

Country	Service[s]	Satellite[s]
Anguilla	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Bermuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
British Virgin Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus Anik C1, C2, C3, D1, D2, E-A and E-B (see note 4)
Cayman Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Mèxico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos-I and II satellites
Montserrat	T.V., audio and data receive-only	all satellites listed in Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D4

SUMMARY OF INTELSAT CONSULTATIONS CONT.

Country	Service[s]	Satellite[s]
Turks & Caicos	T.V., audio and data receive-only	all satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions). All services (i.e. T.V., audio and data receive-only) can be provided to any Latin American/Caribbean point over any of the satellites listed in Attachment 1 even though only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) Attachment 2 does not contain all of the Latin American/Caribbean countries which have been included in previous charts. Attachment 2 contains only those countries that associated with the most recent INTELSAT Article XIV(d) consultation in October 1989 (AP-15-23E). Other countries will be added to the list once they associate with that consultation.

4) No final authority will be granted for the use of the Anik E-A and E-B satellites until an applicant submits an operating agreement and the Commission determines that the agreement is in the public interest and consistent with the Commission's Transborder Policy.

ATTACHMENT 3

Countries which PAS-1 is authorized to serve.

Ku-band Countries: Between the U.S. and the Bahamas, Denmark, France, Germany, Ireland, Italy, Luxembourg, Monaco, the Netherlands, Portugal, Sweden, and the United Kingdom.

C-band Countries: Between the U.S. and Argentina, Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, and Peru.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CONTEL FEDERAL SYSTEMS — File No. I-T-C-90-181

For Blanket Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Establish Channels of Communication between the U.S. and the Pan American Satellite (PAS) Satellite System for the Provision of International Communications Services

AMERICAN SATELLITE COMPANY d/b/a/CONTEL ASC — File No. I-T-C-90-184

For Blanket Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Establish Channels Communication between the U.S. and the Pan American Satellite (PAS) Satellite System for the Provision of International Communications Services.

CONTEL FEDERAL SYSTEMS — File No. I-T-C-90-183

For Blanket Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Establish Channels of Communication between the U.S. and various Countries for the Provision of INTELSAT Business Services.

ORDER AND AUTHORIZATION

Adopted: May 13, 1991; Released: May 28, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned applications filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that their grant will serve the present and future public convenience and necessity.

2. Accordingly, IT IS ORDERED that the applications of Contel Federal Systems, File Nos. I-T-C-90-181 and I-T-C-183, and Contel ASC, File No. I-T-C-90-184, ARE GRANTED and:

a. Contel Federal Systems is authorized to establish channels of communication between existing and future earth stations owned and operated or leased by Contel Federal Systems in the U.S. and those countries which the Pan American Satellite system is authorized to serve for the provision of international television, video and audio services, not interconnected with the public switched network. Contel Federal Systems is also authorized to establish channels of communications not to exceed one T-1 circuit to each country between existing and future earth stations owned or leased by Contel Federal Systems for the provision of private line service not interconnected with the public switched network;[1]

b. Contel Federal Systems is authorized to establish channels of communication between existing and future earth stations owned and operated or leased by Contel Federal Systems in the U.S. and appropriate INTELSAT Atlantic Ocean Region or Pacific Ocean Region satellites for the provision of INTELSAT Business Services (IBS) between the U.S. and those countries listed in Comsat's IBS tariff; and

c. Contel ASC is authorized to establish channels of communication between existing and future earth stations owned and operated or leased by Contel ASC in the U.S. and those countries which the Pan American Satellite system is authorized to serve for the provision of international television, video and audio services, not interconnected with the public switched network. Contel ASC is also authorized to establish channels of communications not to exceed one T-1 circuit to each country between existing and future earth stations owned or leased by Contel ASC for the provision of private line service not interconnected with the public switched network.[2]

3. IT IS FURTHER ORDERED Contel Federal Systems and Contel ASC are restricted in their communications with the PAS-1 satellite to the provision of capacity through the sale or long-term lease (at least one year) of transponder capacity for communications not interconnected with the public switched message networks (except for emergency restoration services).

4. IT IS FURTHER ORDERED that authorization to use the PAS-1 satellite is subject to Commission jurisdiction over the use of all space segment within the PAS system to ensure compliance with the restrictions placed on the operation of separate satellite systems.

5. IT IS FURTHER ORDERED that the authority granted herein for the applicants to establish channels of communication between existing and future earth stations and the PAS-1 and INTELSAT satellites does not dispense with the requirement that all such earth stations must be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

6. This authorization is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Alpha Lyracom, d/b/a Pan American Satellite, 4 FCC Rcd 8649 (1989). PAS-1 is authorized to provide service via its Ku-band capacity between the United States and the Bahamas, Denmark, Federal Republic of Germany, France, Ireland, Italy, Luxembourg, Monaco, the Netherlands, Portugal, Sweden, and the United Kingdom. PAS-1 is authorized to provide service via its C-band capacity between the United States and Argentina, Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, and Peru.

[2] *See* footnote 1, *supra*.

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XIV(d)

Satellites

AURORA (SATCOM V)
COMSTAR D-4
CONTEL ASC-I
CONTEL ASC-II
GALAXY I
GALAXY II
GALAXY III
GALAXY IV-R
GALAXY V-R
GALAXY VI (WESTAR VI-S)
GSTAR I
GSTAR II
GSTAR III
SATCOM IR
SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
SATCOM K-2
SBS I
SBS II
SBS III
SBS IV
SBS V
SBS VI
SPACENET I
SPACENET II
SPACENET III
TELSTAR 301 (TELSTAR 3A)
TELSTAR 302
TELSTAR 303
WESTAR IV
WESTAR V

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATIONS

Country	Service[s]	Satellite[s]
Anguilla	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
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Cayman Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 - plus the Morelos-I and II satellites
Montserrat	T.V., audio and data receive-only	all satellites listed in Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D4

SUMMARY OF INTELSAT CONSULTATIONS CONT.

Country	Service[s]	Satellite[s]
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Notes

1) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions). All services (i.e. T.V., audio and data receive-only) can be provided to any Latin American/Caribbean point over any of the satellites listed in Attachment 1 even though only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

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3) Attachment 2 does not contain all of the Latin American/Caribbean countries which have been included in previous charts. Attachment 2 contains only those countries that associated with the most recent INTELSAT Article XIV(d) consultation in October 1989 (AP-15-23E). Other countries will be added to the list once they associate with that consultation.

4) No final authority will be granted for the use of the Anik E-A and E-B satellites until an applicant submits an operating agreement and the Commission determines that the agreement is in the public interest and consistent with the Commission's Transborder Policy.

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C-band Countries: Between the U.S. and Argentina, Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, and Peru.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COM SYSTEMS, INC.,
Complainant,

v. File No. E-90-210

PACIFIC BELL,
Defendant.

ORDER

Adopted: May 20, 1991; Released: May 29, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 18, 1990, Com Systems, Inc. (hereinafter "Com Systems") filed with the Commission a formal complaint against Pacific Bell seeking recovery of damages for Pacific Bell's alleged overearnings for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, Pacific Bell filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On May 10, 1991, the parties filed a joint motion seeking dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell's AAD 90-12
Permanent Cost Allocation
Manual for the Separation of
Regulated and Nonregulated Costs

MEMORANDUM OPINION AND ORDER

Adopted: May 21, 1991; Released: May 29, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On June 29, 1990, Pacific Bell (Pacific) filed revisions to its permanent cost allocation manual (CAM) which is used for allocating costs between its regulated and nonregulated activities. Pacific proposes several changes to its cost categories and allocation methods. MCI filed comments only on the proposed changes related to time reporting and Pacific filed a reply. We have reviewed Pacific's revisions and the pleadings applicable thereto and will allow the revisions.

2. In the *Joint Cost Order*, [1] the Commission required Tier 1 carriers [2] to file manuals to separate the costs of regulated telecommunications services from the costs of nonregulated activities. The manuals describe the carriers' nonregulated activities, list the activities they treat as incidental activities, and provide information on their affiliate transactions, employee time reporting procedures, and cost apportionment methods. Pacific filed its initial manual on September 1, 1987. It has filed revisions pursuant to two Bureau orders [3] and has subsequently filed routine quarterly updates. [4]

II. ANALYSIS OF PACIFIC BELL'S PROPOSAL AND MCI'S COMMENTS

3. Pacific proposes several changes which are minor, while others are more substantive and involve clarifications or modifications of its cost pools and allocations procedures. Substantive changes include clarification of cost pool names and identification bases, and the addition of cost pools for Account 4100, Net current deferred operating income taxes, Account 4340, Net noncurrent deferred operating income taxes, and Account 7210, Operating investment tax credits-net. [5] In addition, Pacific proposes to implement a new time reporting technique within its marketing department effective January 1, 1990. The new reporting technique involves the use of tracking codes to identify unclassified productive time. As a result of this change, Pacific proposes revisions to the following accounts: Account 6611, Product management, Account 6612, Sales, Account 6613, Product advertising, Account 6623, Customer services and Account 6722, External relations. [6]

4. The proposed revisions affect the Salary Related Costs cost pools and the Support and Supervision cost pools in Accounts 6611, 6612, 6613, 6623, and 6722. In the Salary Related Costs cost pool, reported unclassified productive time is now identified by tracking code. Formerly, such costs were not separately identified. In the Support and Supervision cost pools, costs are now directly attributable to regulated and nonregulated in the same proportion as directly assigned and attributed wages and salaries within the marketing function of each individual account. Formerly, support and supervision costs were indirectly attributed to regulated and nonregulated in the same proportion as previously directly assigned and attributed total expenses within the marketing function of all five of the accounts combined. Pacific also proposes a change in the Common Residual cost pools in Accounts 6611, 6612, and 6613. Costs assigned to these cost pools are directly identified by tracking code. Formerly, such costs were directly identified using both function code and tracking code. Pacific's proposed change clarifies that reliance on both function and tracking codes is not necessary and that the use of tracking codes is sufficient to identify these cost pools because of the change it has made to the reporting of nonclassifiable productive time.

5. MCI opposes Pacific's changes to its time reporting procedures. MCI believes that Pacific is merely proposing the time reporting mechanism which the Commission suggested in the *Nevada and Pacific Order* and which Pacific failed to implement to the Commission's satisfac-

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[1] Separation of Costs of Regulated Telephone Service from Cost of Nonregulated Activities, *Report and Order*, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *modified on recon.*, 2 FCC Rcd 6383 (1987), *modified on further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F. 2d 1378 (DC Circ. 1990).

[2] A Tier 1 carrier is defined as a local exchange carrier that earns more than $100 million in total company regulated annual revenues. *See* 1984 Annual Statistical Volume II of USTA Statistical Reports of Class A & B Telephone Companies for the year 1983.

[3] *See* Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 287 (Com. Car. Bur. 1988) (*Nevada and Pacific Order*); Nevada Bell's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs and Pacific Bell's Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 7081 (Com. Car. Bur. 1988) (*Nevada and Pacific Revision Order*).

[4] The *Nevada and Pacific Order* defines the type of changes to the Pacific cost manual that should be submitted quarterly, on March 31, June 30, September 30, and December 31 of each year.

[5] Pacific's Revised Manual at Section 8, pp. 8-5, 8-45, 8-46, 8-84, and 8A-1 to 8A-7.

[6] *Id.* at Section 8, pp. 8-69 to 8-72, 8-74 and 8-77.

tion. [7] MCI also argues that Pacific has not provided adequate documentation on how the system was developed, what guidelines employees must follow when using the system, and what impact this change will have on cost allocation. [8] Finally, MCI requests that the Commission should direct Pacific to provide such information before Pacific is permitted to implement this time reporting change. [9]

6. In rebuttal, Pacific states that the changes made to Accounts 6611, 6612, 6613, 6623 and 6722 in its revisions filed June 29, 1990, have no relation to the changes required for these accounts by the *Nevada and Pacific Order*, or the *Nevada and Pacific Revision Order*, but have been made as part of Pacific's ongoing effort to improve its cost allocation system. [10] Pacific argues that its proposed changes will constitute an improvement to its system because the new reporting technique allows nonclassifiable productive time for marketing employees to be assigned in the same manner as their other productive time. [11]

7. Finally, Pacific states that the Commission should disregard MCI's request for additional information because it contends its manual provides sufficient detail for the Commission to make an informed judgment about the manual and the subsequent revisions. [12]

III. DISCUSSION

8. We conclude that Pacific's June 29, 1990, cost manual revisions related to time reporting are acceptable. We also accept the proposed revisions not specifically addressed by MCI and conclude that they are consistent with the Commission's cost allocation rules and policies.

9. MCI is incorrect in asserting that Pacific has waited until it filed its June 29, 1990, revisions to develop the time reporting mechanism suggested in the *Nevada and Pacific Order*. Pacific filed revisions on March 21, 1988, in response to that Order, and submitted further revisions on January 31, 1989, in response to the *Nevada and Pacific Revision Order*. In those revisions, Pacific addressed the Bureau's previously-stated concerns. Based on our review, we conclude that the instant revisions, on the other hand, represent efforts initiated by Pacific to further adjust its time reporting methods. Expenses in the Common Residual cost pools are now directly identified by tracking codes due to changes in the reporting of nonclassifiable productive time. Also, the new reporting techniques refer to changes that, as of January 1, 1990, assigned nonclassified productive time for marketing employees in the same manner as their other productive time. Additionally, for the support and supervision cost pools, the change allows expenses to be directly attributed to regulated and nonregulated rather than indirectly attributed, because the marketing employee's time is directly assigned by function and tracking codes. We have decided to allow Pacific's CAM changes because the revisions either clarify the procedures Pacific is using in its CAM or in some cases provide for better assignment to regulated and nonregulated by using direct instead of indirect attribution. We have determined that these revisions are consistent with our joint cost rules.

10. We also do not agree with MCI's claim that Pacific must provide additional information on how the new allocation system was developed, what guidelines employees follow when entering payroll data and what impact the new system will have on cost allocation. Our review of the manual confirms that it contains sufficient information for us to evaluate Pacific's cost pool assignment and apportionment methods. The staff has reviewed Pacific's CAM revisions from December 31, 1988, through December 31, 1990, and have found them to be in compliance with Section 64.901 of the Commission's Rules.

IV. ORDERING CLAUSE

11. Accordingly, IT IS ORDERED, pursuant to Section 4 (i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154 (i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. § 0.91, 0.291, that the revisions filed June 29, 1990, by Pacific Bell ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[7] MCI Comments at 2.
[8] *Id.* at 2.
[9] *Id.* at 2.
[10] Pacific Reply at pp. 2 and 3.
[11] *Id.* at 4.
[12] *Id.* at 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHARTWAYS TECHNOLOGIES, INC.,
Complainant,

v. File No. E-88-72

AT&T COMMUNICATIONS,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: May 21, 1991; Released: May 29, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. Chartways Technologies, Inc. ("CTI") [1] filed a formal complaint against AT&T Communications (AT&T), alleging violations of Sections 201(b) and 202(a) of the Communications Act (the Act), 47 U.S.C. §§201(b), 202(a). CTI contends that AT&T's attempt to hold it liable for charges for AT&T services obtained through unauthorized use of CTI's telephone system constitutes an unjust, unreasonable and discriminatory practice within the meaning of Sections 201(b) and 202(a) of the Act. CTI seeks an order by the Commission declaring AT&T's actions to be unlawful and prohibiting AT&T from imposing liability on CTI for charges associated with the unauthorized calls. For the reasons discussed below, we deny CTI's complaint. [2]

II. BACKGROUND AND CONTENTIONS OF THE PARTIES

2. The facts underlying CTI's complaint are largely undisputed. [3] In May, 1986, CTI, a computer software services company based in Rockville, Maryland, subscribed to AT&T's 800 Service under AT&T Tariff F.C.C. No. 2 and to AT&T's Long Distance Message Telecommunications Service (LDMTS) under AT&T Tariff F.C.C. No. 1 and connected these services through PBX equipment located on CTI's premises. [4] In addition, CTI, through its equipment supplier Northern Telecom, added to its PBX a remote access feature, a Direct Inward System Access ("DISA") line, which allowed off-premises callers with the proper company-issued DISA access code to access interexchange carrier services over AT&T's long distance network.

3. On March 31, 1988, AT&T notified CTI by telephone that it had detected an unusual volume of calls to Pakistan originating out of CTI's PBX. CTI informed AT&T that it had not authorized the calls and that it had a remote access feature connected to its PBX from which the calls could have been placed. AT&T responded that it had no prior knowledge of the remote access feature and informed CTI that it would be held liable for charges associated with the unauthorized calls.

4. Also on March 31, CTI received a bill from AT&T's billing agent, The Chesapeake and Potomac Telephone Company of Maryland ("C&P"), which confirmed the unauthorized AT&T toll charges. Subsequently, pursuant to CTI's request, Northern Telecom monitored the DISA line and determined that the unauthorized calls were in fact originating from an off-premises location through CTI's DISA line. In April 1988, CTI made arrangements with AT&T and the United States Secret Service Fraud Division to trace the origin of the unauthorized calls. It was determined that such calls were originating in the Rego Park, New York City area. Shortly thereafter, CTI disconnected the DISA line and the unauthorized LDMTS calls stopped. AT&T again informed CTI that it would be held liable for all unauthorized calls placed through the DISA line. Charges associated with the unauthorized calls amount to $81,788.90. [5]

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[1] Formerly, Sage Federal Systems, Inc.

[2] We also have before us a motion filed by CTI on April 12, 1991, requesting that the complaint proceeding be held in abeyance pending final Commission action in a separate, unrelated proceeding involving toll fraud issues. *See* Petition of Pacific Mutual Life Insurance Company for Declaratory Ruling and for the Establishment of Policies Relative to the Allocation of Responsibility for Toll Fraud Abuse Involving Combinations of Remote Access Network Services and Customer Premises Systems, File No. ENF-91-07, filed January 30, 1991 ("Petition"). CTI asserts that the Petition is likely to result in implementation of rules and policies with respect to the allocation of costs and liability for toll fraud which will facilitate resolution of CTI's dispute with AT&T. According to CTI, the public interest would be best served by a Commission proceeding adopting rules and policies governing toll fraud which can then be consistently applied to individual disputes between carriers and their customers. In opposition to the motion, AT&T notes that the issues raised in the complaint have been fully briefed by the parties and argues that there is no basis to delay action on the complaint while the Commission decides whether to initiate rulemaking proceedings in response to the Petition. CTI filed a reply to AT&T's opposition which reiterates its claims. We deny CTI's motion to hold in abeyance. We are not persuaded that Commission action on the Petition is necessary to a full and fair resolution of CTI's complaint. The legal and factual issues underlying CTI's complaint have been briefed extensively by the parties. We see no reason to further delay action on CTI's complaint on the specific facts before us pending resolution of an unrelated petition looking towards the possible establishment of Commission rules and policies of general applicability.

[3] During a status conference held on May 24, 1989, the Enforcement Division directed the parties to submit a joint stipulation of facts not in controversy and legal briefs summarizing their respective positions. The parties submitted a Joint Stipulation of Facts ("Stipulated Facts") in September 1989 and legal briefs were subsequently filed in October 1989.

[4] The 800 Service enables CTI's customers to call CTI offices free of charge while the LDMTS service enables CTI to place calls over AT&T's long distance network.

[5] Stipulated Fact 42

5. CTI advances several arguments in support of its claims that AT&T's effort to impose liability on CTI constitutes an unjust and unreasonable practice in violation of Section 201(b) of the Communications Act. [6] First, CTI maintains that it employed all reasonable precautions to prevent unauthorized access to its PBX system through its DISA line by, for example, composing a ten-digit access code. CTI argues that AT&T, on the other hand, knew, but failed to notify it that extraordinary measures were necessary to prevent unauthorized use of its switch. According to CTI, AT&T was aware that unauthorized calling to and through customer premises equipment was a common and growing problem, but never made any attempt to place CTI on notice of the possibility of such theft, or of possible methods of preventing unauthorized access to its PBX through the DISA remote access feature. CTI describes itself as an innocent victim, and argues that it would be contrary to the public interest to hold CTI, rather than the party that actually made the calls, responsible. [7]

6. CTI next contends that, irrespective of CTI's reliance on its own internal security measures, AT&T's tariff failed to put CTI on actual notice that it would be liable for any unauthorized use of AT&T's services through CTI facilities. CTI argues that AT&T Tariff F.C.C. No. 2 is ambiguous on its face and contrary to Section 61.2 of the Commission's Rules, 47 C.F.R. §61.2, [8] because it nowhere states that a subscriber is responsible for unauthorized third party use. [9] CTI states that Section 61.2 requires tariff language to be unambiguous and provide customers with full and specific information concerning their responsibilities, such as unauthorized use of a customer's services. Thus, CTI argues that it is not liable for the unauthorized charges. CTI also argues that Commission precedent clearly establishes that vague tariffs must be construed against the drafter and in favor of the customer. [10]

7. Finally, CTI argues that AT&T's attempt to collect charges from CTI for what AT&T concedes was the unauthorized use of AT&T services by third parties, [11] constitutes an unreasonable discrimination under Section 202(a) of the Act. According to CTI, AT&T is forbidden by law from collecting more than $50 for unauthorized charges on its AT&T Calling Card. [12] CTI contends that there is no reasonable basis for AT&T to assess charges for unauthorized use of its services for which CTI would not be liable if a calling card had been used. Therefore, CTI contends, AT&T's limitation of liability for unauthorized use of its LDMTS services when toll fraud involves calling card calls but not limiting liability when toll fraud involves dial station calls, is an unreasonably discriminatory practice.

8. In response, AT&T maintains that both AT&T Tariff F.C.C. No. 1 and AT&T Tariff F.C.C. No. 2 are clear and unambiguous and require CTI to pay the disputed LDMTS and 800 Service charges. AT&T contends that CTI's reliance on Section 61.2 of the Commission's Rules is misplaced since that rule only requires that where exceptions to a general payment obligation exist, tariffs must explicitly state the exceptions, along with the limits and conditions. [13] AT&T asserts that its Tariff F.C.C. No. 1 and Tariff F.C.C. No. 2 both conform to these requirements by explicitly describing the terms and conditions of all exceptions to general payment obligations. Moreover, AT&T argues that it is just and reasonable to hold CTI responsible for calls CTI had the opportunity to control. AT&T states that it had no control of CTI's PBX [14] and was unaware that CTI had added a remote access feature. AT&T claims that once notified, it was still incapable of blocking any particular calls without blocking all customers passing through the central office serving CTI. AT&T adds that it had no obligation to investigate equipment provided to CTI by Northern Telecom to determine whether it was susceptible to unauthorized calls. In any event, AT&T states, it had no right to investigate CTI's Northern Telecom equipment except upon CTI's request and that no such request was received.

9. AT&T states that CTI's reliance on Federal Reserve Board regulations to support its discrimination claims is misplaced because those regulations do not prohibit carriers from offering different classes of service at different prices and subject to different terms and obligations. AT&T argues that calling card calls and dial station calls are neither within the same class of service nor subject to the same terms and obligations. Thus, AT&T argues, Section 202(a) does not apply to CTI's claims. AT&T adds that even if there was discrimination within the meaning of Section 202(a), it was not unreasonable. According to AT&T, the exemption of calling card cardholders from the general tariff payment obligation is a reasonable practice since the calling card number is an AT&T controlled number, not one chosen by the customer.

10. Finally, AT&T argues that there are sound public interest reasons to hold customers responsible for tariffed charges resulting from the unauthorized use of their telephone systems. First, AT&T states that the theft of service was from CTI, not AT&T, because the callers violated CTI's security measures and accessed CTI's premises equipment. Second, AT&T states that only CTI has standing to claim that the calls were in fact unauthorized and to seek help from the appropriate law enforcement agency and local exchange company. Third, AT&T asserts that the most effective means to end unauthorized calling is through customer security. In the absence of such liability, AT&T states that a customer would have no incentive to secure its system.

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[6] CTI Brief at 7; Reply brief at 5.

[7] CTI Brief at 12-13

[8] Section 61.2 provides in pertinent part that "in order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.

[9] Complaint at 5; CTI Brief at 10-11.

[10] CTI Brief at 11, *citing Associated Press*, 72 FCC 2d 760, 765 (1979)

[11] Complaint at 23; CTI Brief at 11.

[12] Complaint at 8; CTI Brief at 12 *citing* Truth in Lending Act, 15 U.S.C. §1643; Federal Reserve Board Regulations, 12 C.F.R. § 226.3(c)(n. 4) (1988).

[13] AT&T Brief at 12 *citing* 47 C.F.R. § 61.54(j).

[14] Answer at 30; AT&T Brief at 14.

III. DISCUSSION

11. We have carefully reviewed the record in this proceeding and conclude that CTI has not satisfied its burden of proof in alleging violations by AT&T of Sections 201(b) and 202(a) of the Act.

12. It is true, as CTI states, that Commission rules require that carrier tariffs contain clear and definite language, specifying any exceptions to a general payment obligation that may exist. [15] CTI's claim, however, that AT&T's tariffs at issue here are ambiguous and contrary to the express provisions of Section 61.54(j) is unfounded. AT&T Tariffs F.C.C. No. 1 and F.C.C. No. 2 clearly impose liability on subscribers for tariffed charges associated with 800 Service and LDMTS usage (including all calls originated at the subscriber's number), except in those instances where exceptions to the general payment obligations are explicitly stated, for example, for wrong numbers [16] or Directory Assistance calls originated by handicapped customers. [17] We are unpersuaded by CTI's argument that the tariffs are unreasonably vague because they do not specify customer liability for unauthorized use of AT&T's 800 and LDMTS services obtained through customer facilities.

13. We note that CTI has made no allegations nor provided any evidence that would show AT&T was negligent in any way with regard to the unauthorized calls. In the instant case, it appears that an unauthorized caller was able to gain access to CTI's PBX through its DISA line and thereby access AT&T's long distance network. CTI's PBX authorized the calls once the caller used the proper access code [18] invented and implemented by CTI. There is no dispute that CTI at all times had the capability to restrict access to and egress from its PBX. [19] The record indicates that AT&T has consistently applied the terms of its tariffs to hold the customer liable where unauthorized calls are made from the customer's telephone system and the customer is able to control access to its telephone system. [20] It is clear that adoption of the complainant's position would, in effect, require AT&T to indemnify its customers for unauthorized calls and force it to absorb the costs associated with such calls. On the basis of the record before us, we find that CTI has not demonstrated that AT&T engaged in any unjust and unreasonable practices within the contemplation of Section 201(b) of the Act.

14. We turn now to CTI's final claim that AT&T's practice of limiting the liability of customers for unauthorized LDMTS usage involving a calling card versus its practice of billing in full for unauthorized LDMTS usage through a dial station constitutes an unreasonably discriminatory practice in violation of Section 202(a) of the Act. [21] CTI argues, in effect, that there is no reasonable basis for limiting liability for customers victimized by the unauthorized use of a calling card while imposing full liability on other customers where the toll fraud was accomplished through the unauthorized use of the customer's remote dial station.

15. After carefully reviewing the record before us, we are not persuaded by CTI's contentions that AT&T's actions complained of violate Section 202(a) of the Act. As both parties acknowledge, the Truth in Lending Act, 15 U.S.C. § 1643, limits the liability of credit cardholders, including utility credit cardholders, for fraudulent use to $50. [22] AT&T, as a calling card issuer with the right and means to invalidate the calling card when unauthorized use is discovered, is therefore required by law to limit the liability of calling card customers for service charges resulting from such unauthorized use. No similar statutory requirement exists with regard to charges for calls such as those placed over the type of customer-owned and installed remote access feature at issue here nor do we believe that such a requirement flows from the Communications Act or is required to give effect to the Act's prohibition against unjust and unreasonable practices. In the case before us, it is clear that AT&T's role with respect to CTI's dial station is not analagous to a calling card issuer since it has neither the ability nor the right to exercise control over use of the remote access feature. The record indicates that the remote feature at issue here was independently purchased and installed by CTI and that CTI alone determines and assigns the code necessary to gain access to AT&T and possibly other interstate telecommunications services. CTI otherwise controls, or has in place mechanisms designed to control, all egress to and from the dial station. [23] AT&T, on the other hand, merely provides services that can be accessed through the remote feature and absent some prior arrangement or notification by CTI, would have neither the basis nor the right to question or restrict completion of calls placed through CTI's dial station. [24] Under these circumstances, we find no merit in CTI's claim that AT&T's actions at issue in the instant case constitute unreasonable discrimination within the meaning of Section 202(a).

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[15] 47 C.F.R. §61.54(j) provides in pertinent part: "The general rules..., regulations, exceptions and conditions which govern the tariff must be stated clearly and definitely. All general rules, regulations, exceptions or conditions which in any way affect the rates named in the tariff must be specified.

[16] *See* AT&T Tariff F. C. C. No. 1 § 2.6.1. B.

[17] *See* AT&T Tariff F. C. C. No. 1 § 3.2.5. C.

[18] Stipulated Fact 1.

[19] Stipulated Fact 21.

[20] The record further indicates that AT&T's policy has been consistently upheld by the courts and state commissions. *See* AT&T Brief at 12, *citing* Sonstegard v. General Telephone Co., 273 N.E. 2d 151, 152 (Ohio Ct. Common Pleas 1969); Crawford County v. Bushmiaer, 31 S. W. 2d 144, 145 (Ark. 1930); Gaither v. Mountain States Telephone and Telegraph Company and AT&T Communications, Case No. GNR-T-88-4, Order No. 22068 (Idaho P.U.C., August 12, 1988); Amaral v. AT&T Communications, Inc., D. P. U. 87-53-I (Massachusetts D.P.U., July 1, 1987).

[21] Section 202(a) provides in pertinent part that "it shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices... for or in connection with like communications service. .. or to make or give any undue or unreasonable preference or advantage to any particular person, class or class of persons...."

[22] *See* footnote 11 *supra*.

[23] It is undisputed that the unauthorized calls originated from CTI's dial station.

[24] It is not clear from the record whether AT&T would in any event have the technical capability to identify or screen calls originating from a remote access feature such as CTI's DISA line as a means of protecting against unauthorized use.

IV. CONCLUSION

16. Under the factual circumstances of record, we cannot find that AT&T's actions in requiring payment from CTI for charges associated with the unauthorized dial station calls constitute unjust and unreasonable practices under Section 201 or unreasonable discrimination under Section 202 of the Act. [25]

17. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the motion filed by Chartways Technologies, Inc. to hold the captioned proceeding in abeyance IS DENIED.

18. IT IS FURTHER ORDERED, that the above-captioned complaint filed by Chartways Technologies, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

[25] We emphasize that in taking this action we are in no way prejudging the issues raised in Pacific Mutual's toll fraud petition. *See* footnote 2, *supra*. Our finding with respect to CTI's formal complaint that AT&T's actions do not violate existing statutory provisions and Commission rules is not a conclusion as to whether such rules and policies should be changed. We will carefully examine the record in the Pacific Mutual proceeding to determine whether questions raised regarding overall, generic problems associated with toll fraud warrant consideration in a rulemaking proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NTS COMMUNICATIONS, INC. File No. I-T-C-91-090

Application for authority to operate as an international resale carrier.

SOUTH TEL, INC. File No. I-T-C-91-092

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 16, 1991; Released: May 29, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by NTS Communications, Inc. and South Tel, Inc.

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-090 and I-T-C-91-092 ARE GRANTED, and

a. NTS Communications, Inc. is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, Cable and Wireless Tariff F.C.C. No. 3, ATC's Tariff F.C.C. No. 1 and US Sprint's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs; and

b. South Tel, Inc. is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

3. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

In the Matter of

SOUTHERN PACIFIC TELECOMMUNICATIONS CO. File No. I-T-C-91-084

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: May 16, 1991; Released: May 29, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Southern Pacific Telecommunications Co. (SP Telecom).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-084 IS GRANTED, and SP Telecom is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2, TRT/FTC's Tariff F.C.C. No. 12 and Worldcom's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs.

3. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WORLD COMMUNICATIONS, INC. File No. I-T-C-91-095

Application for authority to acquire and operate facilities in the TASMAN-2 cable.

ORDER AND AUTHORIZATION

Adopted: May 16, 1991; Released: May 29, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-095 IS GRANTED, and World Communications, Inc. (Worldcom) is authorized to:

a. acquire and operate 30 Minimum Assignable Units of Ownerships (MAUOs) jointly owned with its Australian correspondent, OTC Limited, in the TASMAN-2 cable between Australia and New Zealand;

b. lease necessary overseas connecting facilities; and

c. use said facilities to provide Worldcom's regularly authorized services between the U.S. and Australia and beyond.

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-139

In the Matter of

Reorganization and Deregulation
of Part 97 of the Rules Governing
the Amateur Radio Service.

MEMORANDUM OPINION AND ORDER

Adopted: May 17, 1991; Released: May 29, 1991

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. On May 31, 1989, the Commission adopted a *Report and Order* in this proceeding[1] that, *inter alia*, reorganized the amateur service rules and codified existing policies. The purpose of the reorganization was to create a regulatory environment that would encourage modern techniques, technology, and uses of amateur radio. Three petitions for reconsideration were filed. On July 9, 1990, the Commission adopted a *Memorandum Opinion and Order* disposing of those petitions.[2] On August 8, 1990, one of the original petitioners, David B. Popkin, filed a second petition for reconsideration. This *Memorandum Opinion and Order* disposes of his second petition for reconsideration by making non-substantive, editorial changes to the mailing address and station location rule. His requests concerning a 9-digit zip code and self-assigned indicators that are included with the call sign during station identification procedures are repetitious and are, therefore, denied.

II. BACKGROUND

2. The petitioner states that he is filing this second petition for reconsideration because he feels consideration was not given to all the points made in his original petition for reconsideration as required by Section 1.425 of the Commission's Rules, 47 C.F.R. § 1.425. Specifically, he argues that certain preferences of, and terms used by, the United States Postal Service were not adopted in accordance with his request. Additionally, he requests that Section 97.119(c) of the Commission's Rules, 47 C.F.R. § 97.119(c), be amended to state that a self-assigned indicator may be used after the station call sign, if there is no intention to conflict with any other indicator specified by the Commission's Rules or with any prefix assigned to another country.

III. DISCUSSION

3. Section 1.425 of the Commission's Rules, 47 C.F.R. § 1.425, which the petitioner relies on, is not applicable here. That section requires consideration of all relevant comments and the record before final action is taken in a rule making proceeding. After such consideration, the final decision must incorporate the Commission's findings and the reasons for the action taken. It is well settled that the courts do not expect an administrative agency to respond to every comment or to discuss every fact or opinion in the comments submitted in informal rule making proceedings. *See Thompson v. Clark*, 741 F.2d 401, 408 (1984). *See also Automotive Parts & Accessories Association v. Boyd*, 407 F.2d 330, 338 (1968).

4. Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, governs the filing of petitions for reconsideration in rule making proceedings. That section requires that petitions for reconsideration must show changed facts or circumstances, or facts that were unknown to the petitioner until after the last opportunity to present them to us. Absent those criteria, a determination must be made that the public interest will be served by considering the facts relied on in the petition for reconsideration.

5. The public interest will be served by making non-substantive, editorial revisions to Section 97.21 of the Commission's Rules, 47 C.F.R. § 97.21. That rule concerns an amateur service licensee's mailing address and the location of the amateur station. That rule will be amended to specify that a post office box is not suitable as an amateur station location whether the box is provided by the United States Postal Service or by any other party. In addition, instead of stating that a rural delivery service number is not suitable as a station location, the rule will be amended to reflect current postal terminology.

6. The petitioner again requests amendment of the rules to show a 9-digit zip code number in those sections of the amateur service rules that refer to the procedures for filing license applications. There is no United States Postal Service requirement that mandates the use of a 9-digit zip code. The rules, therefore, will continue to show a 5-digit zip code in addresses to which applicants send their license applications.

7. The petitioner's request to include a provision in Section 97.119(c) that self-assigned indicators may be used after the station call sign, if there is no intent on the part of the user to conflict with any other indicator specified by the rules or with any prefix assigned to another country, will be denied. The rule, as written, requires that a licensee must take affirmative action to assure that no conflict will result from the use of the self-assigned indicator. To word the rule to state that the user must not intend to cause a conflict with any other Commission-assigned indicator or prefix of a foreign country would weaken the rule and make it meaningless.

IV. PROCEDURAL MATTER

8. Because the amendment ordered herein is nor
stantive and editorial in nature, and, therefore, not
troversial, it constitutes a minor amendment t
amateur service rules in which the public is not lik
be interested. For good cause shown, it is unnecessa
comply with the notice and comment procedure c
Administrative Procedure Act. *See* 5 U.S.C. Se
553(b)(B).

V. CONCLUSION

9. In view of the foregoing, and pursuant to the authority contained in 47 U.S.C. § 154(i), and Sections 0.331(a)(1) and 1.429(i) of the Commission's Rules, 47 C.F.R. §§ 0.331(a)(1) and 1.429(i), IT IS ORDERED THAT the petition for reconsideration filed by David B. Popkin IS GRANTED as indicated herein, and IS DENIED in all other respects.

10. IT IS FURTHER ORDERED THAT, pursuant to the authority contained in 47 U.S.C. § 303(r), Part 97 is amended, effective **July 22, 1991,** as set forth in the Appendix.

11. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

12. For further information concerning this Memorandum Opinion and Order contact Maurice J. DePont, Private Radio Bureau, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

APPENDIX

Title 47 of the Code of Federal Regulations, Part 97, is amended as follows:

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301-609, unless otherwise noted.

2. The last sentence of Section 97.21 is revised to read as follows:

§ 97.21 Mailing address and station location.

* * * (A post office box whether provided by the United States Postal Service or by any other party, a rural or highway contract route designation and box number, and general delivery are unsuitable as a station location.)

FOOTNOTES

[1] 4 FCC Rcd 4719 (1989).

[2] 5 FCC Rcd 4614 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-387

In re Applications of:

ROXANNE GIVENS	File No. BPH-871202MC
NANCY JEAN PETERSON	File No. BPH-871203MF
SOUTHWEST SUBURBAN BROADCASTING, INC.	File No. BPH-871203MH
CRIMIEL COMMUNICATIONS ASSOCIATES LIMITED PARTNERSHIP	File No. BPH-871203MN
N. WALTER GOINS	File No. BPH-871203NE
JH BROADCAST LIMITED PARTNERSHIP	File No. BPH-871203NF
ANNE M. COUNIHAN	File No. BPH-871203NQ
COVE COMMUNICATIONS, INC.	File No. BPH-871203NT

For Construction Permit for a
New FM Station on Channel 289-A
in Eden Prairie, Minnesota

ORDER

Adopted: May 20, 1991; **Released: May 29, 1991**

By the Commission:

1. In this proceeding, Administrative Law Judge Richard L. Sippel (ALJ) granted a motion for summary decision on a previously-added financial issue, ruling that N. Walter Goins was financially unqualified. FCC 90M-1606, released June 12, 1990, and subsequently dismissed Goins' application. FCC 90M-1921, released July 3, 1990. The Review Board affirmed the ALJ's actions. *Roxanne Givens*, 5 FCC Rcd 5371 (Rev. Bd. 1990) *recon. denied*, 5 FCC Rcd 5905 (Rev. Bd. 1990).

2. Now before the Commission are: (1) an Application for Review filed December 24, 1990 by N. Walter Goins;[1] (2) an Opposition to Application for Review filed January 4, 1991 by Southwest Suburban Broadcasting, Inc.; (3) an Opposition to Application for Review filed January 8, 1991 by Cove Communications; and (4) a Motion to Accept Late-Filed Opposition and an Opposition to Application for Review, both filed January 17, 1991 by JH Broadcast Limited Partnership.

3. After a thorough review of the record, the ALJ's and the Board's decisions, and the arguments presented in the pleadings before us, we agree with the Board's resolution of this case. Although Goins argues that there were procedural errors in the previous rulings[2] and that a petition for special relief he filed with the Mass Media Bureau warrants deferral of this matter, [3] he has made no showing to persuade us that his possession of a cause of action which might produce funds in the future was sufficient to qualify him to be financially "ready willing and able" to construct and operate the proposed station as required by Commission policy and precedent. *See Dutchess Communications Corp.*, 101 FCC 2d 243, 254 (Rev. Bd. 1985).

4. ACCORDINGLY, IT IS ORDERED, That for good cause shown the Motion to Accept Late-File Opposition filed January 17, 1991 by JH Broadcast Limited Partnership, IS GRANTED and its Opposition to Goins' Application for Review IS ACCEPTED.

5. IT IS FURTHER ORDERED, That pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed December 24, 1990 by N. Walter Goins, IS DENIED.

6. IT IS FURTHER ORDERED, That the application of N. Walter Goins (File No. BPH-871203NE) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Goins' pleading is 24 unnumbered pages long -- far in excess of the ten pages allowed pursuant to 47 C.F.R. § 1.115(f) for appeals of Review Board rulings. However, in light of the already protracted nature of this particular matter, we see no useful purpose to be served in this instance by returning the pleading for conformance to the rule.

[2] Goins' argues that because he had until May 31, 1990, to file his reply brief on the financial issue, the filing of a motion for summary decision on May 22 was premature and should have been denied. Furthermore, Goins contends that a motion for summary decision filed after May 31 would not have complied with 47 C.F.R. § 1.251, requiring such motions to be filed at least 20 days prior to the start of the hearing (originally scheduled for June 12, 1990). Thus, Goins claims that the ALJ's action deprived him of his right to a full hearing. We do not agree. The motion for summary decision was timely filed because all the evidence relating to this issue was filed by Goins on May 18, he relied on that evidence in his reply tria filed May 31, and he made no effort to supplement his cas clarify it even when given the opportunity to do so at th 7 prehearing conference. Moreover, Goins did not rais argument with either the ALJ or the Board. Thus, contention is without merit.

[3] The petition asks for a hearing regarding alleged reporting violations and to determine whether the assignment of the licenses of KXLI-TV, St. Cloud Minnesota and KXLT-TV, Rochester, Minnesota were completed in a manner to conceal Goins' ownership interest in Halcomm, Inc., the assignee. Notwithstanding Goins' contentions, this matter is irrelevant to a determination of the adequacy of Goins' interest in Halcomm, Inc. at the time he was relying on that interest as evidence of his financial qualifications.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-331

In re Applications of

MONTGOMERY COUNTY MEDIA NETWORK, INC. *et al.* d/b/a IMAGISTS	File No. BPCT-841129KF
CARMEN MATIAS AND ANDREW N. WIMBISH, JOINTLY	File No. BPCT-841129KK
WOOD BROADCASTING COMPANY	File No. BPCT-841129KW
G - A COMMUNICATIONS, INC.	File No. BPCT-841129LE

For Construction Permit
Conroe, Texas

Appearances

James L. Oyster, Esq. on behalf of Montgomery County Media Network, Inc. *et al.* d/b/a Imagists; *Ann C. Farhat and Howard W. Simcox, Esq.* on behalf of Carmen Matias and Andrew N. Wimbish, Jointly; *Mark N. Uhlfelder, Esq., Mark F. Corriea, Esq., Howard G. Slavit and Philip V. Jackmauh, Esq.* on behalf of Wood Broadcasting Company; *Donald E. Martin and Spencer W. Weisbroth, Esq.* on behalf of G-A Communications, Inc. and *Robert A. Zauner, Esq.* on behalf of the Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: May 13, 1991; Released: May 30, 1991

I. BACKGROUND

1. Dorothy O. Schulze and Deborah Brigham, a General Partnership, is an applicant in the Channel 52 Blanco, Texas, UHF television proceeding (MM Docket No. 85-269). The Schulze/Brigham application, as originally filed on March 20, 1985, reported that Dorothy O. Schulze had interests in the following five television applications:

> Channel 52, Forth Worth, Texas; Channel 53, Castle Rock, Colorado; Channel 51 Tolleson, Arizona; Channel 36, Charleston, South Carolina; and Channel 55, Rock Hill, South Carolina.

On August 14, 1985, in the *Castle Rock, Colorado,* proceeding, Ms. Schulze amended her application with the following representations:

> "Dorothy O. Schulze is a subscriber to 80% of the nonvoting stock of the G-A Corporation, applicant for authority to contruct a new commercial television station on Channel 55 at Conroe, Texas (File No. BPCT-841129LE). Elizabeth Anderson is a sister of Dorothy O. Schulze. She owns 100% of the voting stock of the G-A Corporation, the applicant mentioned above."

In the *Blanco, Texas* proceeding, on January 6, 1986, Schulze denied any involvement in the Conroe, Texas, application:

> "Q. Have you ever been involved in an application for Conroe, Texas?
>
> A. No."

2. The conflict between the information contained in the August 14, 1985 *Castle Rock* amendment and Schulze's January 6, 1986 testimony in the *Blanco* proceeding indicated the need for exploration of the matter at hearing. Thus, previously specified Section 1.65 and misrepresentation/lack of candor issues were deemed suitably phrased to permit the adduction of evidence on the Conroe, Texas, statements proffered by Schulze in the *Castle Rock* amendment (*Castle Rock, Order,* FCC 86M-293, released January 23, 1986).[1]

3. JoAnn Garcia, the president, secretary and treasurer of G-A Communications, Inc., an applicant in this proceeding, is represented as the owner of 100 percent of the applicant's voting stock (20 percent of the equity). Elizabeth Anderson is represented as owning 100 percent of the applicant's non-voting stock (80 percent of the equity). These representations are in patent conflict with the representations made by Schulze in the August 14, 1985 amendment in the *Castle Rock,* Colorado, proceeding.

4. In an effort to explain the circumstances surrounding the filing of the *Conroe, Texas,* application, in the *Blanco* proceeding Schulze-Brigham presented the testimony of, among others, JoAnn Garcia. On the basis of a considerable body of evidence, the presiding officer in the *Blanco* proceeding found, among other things, that the *Conroe* application was one of ten television applications in which Mr. Richard Ozan, the brother of Dorothy Schulze and Elizabeth Anderson, "excercises or has exercised *de facto* control." JoAnn Garcia's testimony, in which she claimed to be the prime mover behind the *Conroe* application, was rejected as "sheer fabrication" and a "web of lies."

5. At an earlier stage of this proceeding, Garcia testified in response to a real-party-in-interest issue which had been added against G-A. Her testimony was essentially replicative of the testimony she had given earlier in the *Blanco* proceeding. She testified that her friends Robert and Elizabeth Anderson first informed her of the avail-

ability of a television opening in Conroe, Texas; that she and Ms. Anderson decided to pursue the opportunity; that no other person has ever held any ownership interest in G-A, that no such interest has ever been offered to any other person, and that no other person has ever been invited to become a principal of G-A. Ms. Garcia also testified that she retained Thomas Root as G-A's Communications attorney and that she subsequently dismissed Mr. Root upon becoming dissatisfied with his services. Finally, Garcia testified that she had met Mr. Richard Ozan on only one occasion; the G-A application was discussed only briefly and incidently at that time. That testimony, which appeared to be essentially uncontradicted in the *Conroe* proceeding, was found to be "believable" and was credited. The real-party-in-interest issue was resolved in favor of G-A.

The issue for determination in this proceeding is the following:

> To determine whether JoAnn Garcia lied to, misrepresented facts to, or lacked candor with the Commission in the Blanco, Texas comparative television (Channel 52) proceeding (MM Docket No. 85-269), *Opal Chadwell*, 1 FCC Rcd. 120 (ALJ 1986) (Initial Decision) 2 FCC Rcd. 5502 (Rev. Bd. 1987), (Decision), *on review*, 65 RR 2d 1498 (1989); and, if so, the effect thereof on the basic qualifications of G-A Communications, Inc. to be a Commission licensee.

6. The specified issue is the result of the Review Board's concern that the presiding officer in the *Conroe* proceeding rendered an opinion about JoAnn Garcia's truthfulness that was directly contrary to the opinion of the presiding officer in the *Blanco* proceeding. In *Blanco*, it was determined that the G-A application was the product of an "application mill" and that Garcia had lied as a witness concerning her role in the G-A application. The burden of proceeding with the introduction of evidence and the burden of proof were placed upon G-A. To carry these burdens, G-A offered the testimony of Dr. Emil Farge, Ms. Perla Rossi-Racine, and Ms. JoAnn Garcia. Hearing was held on November 7, 1989.

II. G-A'S CHARACTER WITNESSES

7. Dr. Emil Farge, a resident of Houston, Texas, is an Associate Professor of Clinical Ophthalmology at Baylor College of Medicine. Tr. 1794. He testified that he has known JoAnn Garcia since the late 1970's or early 1980's, and that she worked as a secretary for five or six years in the same department as Dr. Farge at Baylor College. Tr. 1795. When asked about Garcia's reputation for truthfulness within the institution at Baylor College, Farge replied, "her reputation would be neither greater nor less than other colleagues who've been in my department." Tr. 1797.

8. Farge acknowledged that he was only "slightly" aware of Garcia's reputation at the institution, and that he has had no reason to discuss her with his colleagues. Tr. 1798. He further testified that he only had occasion to see her at the institution a few times a year, when passing in the hall, meeting at the coffee machine, or when dropping off memoranda for one of Garcia's superiors. Tr. 1802, 1795-96, 1808-09. Farge had not seen Garcia around the medical school during the year and a half preceding the hearing. Tr. 1801. Farge did not know Garcia outside of the medical school, and testified that he was "no dear friend of this person, and I've never seen her socially, I don't know anything about her family life." Tr. 1802, 1804.

9. The second witness to testify with respect to Garcia's character was Ms. Perla Rossi-Racine. Ms. Racine resides in Houston. Tr. 1833. As of the hearing date, Racine had known Garcia for two or three years. Tr. 1834, 1835. Racine met Garcia during their mutual association with the Houston International University, where they both sought to establish a foundation to assist students in obtaining housing. Tr. 1834. When asked about Garcia's reputation for truthfulness in the Hispanic community, Racine testified that "she's very honest and respectful and very professional." Tr. 1836. Racine testified that the basis for this statement was that Garcia was called to "take care of" three accounts normally handled by Racine while Racine was out of the country for a month and a half. Racine also testified that Garcia has also served as a ready volunteer on a variety of things. Tr. 1836. Racine said she would not doubt testimony given by Garcia under oath. Tr. 1837, 1841.

III. FINDINGS OF FACT

10. JoAnn Garcia appeared as a witness in the *Blanco* television proceeding on May 5, 1986. *See*, G-A Ex. 11, Docket 85-269, Corrected Transcript, Volume 8, pp. 1701-1799. She testified principally about the facts surrounding the preparation and prosecution of G-A's application for a new television station at Conroe, Texas. JoAnn Garcia has also appeared as a witness in the instant proceeding on three occasions: May 19, 1986; December 1, 1987; and November 7, 1989. G-A's application was filed with the Commission on November 29, 1984 by its former counsel, Thomas L. Root.

11. Garcia testified that she first became aware of the opportunity to file an application for Conroe during a party that she attended at the home of Elizabeth Anderson. Tr. 1771. She telephoned the Federal Communications Commission to learn more about the opportunity, and was told, according to her, that a lawyer might be necessary and that an applicant would have to acquire certain equipment to put the station on the air. Tr. 1776.

12. Thereafter, Garcia testified, she called equipment vendors and sought the advice of a professor in the communications department at the University of Houston to determine whether a station in Conroe would be a good business venture. Among the things she learned was that the hiring of an attorney was an expensive proposition and that she could expect to pay between $75 and $125 an hour for the services of one. Tr. 1778.

13. Garcia claims that she received an application form and instructions for its use from the Federal Communications Commission as a result of her earlier telephone call to that agency. Upon receiving these materials, Garcia sought help from Anderson concerning the completion of the form, and she also sought Anderson's help in obtaining legal counsel. Subsequently, Anderson provided Garcia with the name of Thomas L. Root, whose name Anderson had obtained from her brother, Richard Ozan.

14. Garcia testified that she personally telephoned Thomas Root in September or October of 1984 to inquire about the steps needed to be taken in pursuing an application. Tr., 1754. It was not her purpose to, nor did she, hire Mr. Root at that time. Tr., 1779. Consequently, Root's fees were not discussed. She was not even sure that she would pursue an application. Tr., 1779-81.

15. According to Garcia, even though Root had not been hired by her, in approximately early October 1984 Root sent her three things: an application, a questionaire, and a cover letter "asking me to -- to look at them and answer any questions that I could to the best of my ability, and to send it back to him." Tr., 1780. The materials Garcia says she received from Root did not include a retainer agreement; in fact, at the time she received these materials, Garcia remained uncertain about whether she would pursue an application. Tr., 1781. Nevertheless, Garcia testified that she filled the forms out and returned them to Root's office. Tr., 1781. When she sent the completed forms to Root, she did so with the expectation that he would incorporate the information she provided into a legal document of some kind, and that Root would charge her for such service. But, Garcia claims, she had no idea of how much Root would charge. Tr., 1781-82.

16. On the morning of November 27, 1984, Garcia testified, she received from Root a prepared application for her signature containing the information she had earlier provided. She reviewed the application and discovered that it contained certain mistakes.[2]

17. Garcia claims that on that same day, November 27, 1984, she telephoned Root to discuss these mistakes. After having done so, and after having received Root's assurances, she signed the application and returned it to Root that same day (G-A Ex. 11, Tr. 1740-45), with Garcia in continuing ignorance of Root's charge for his services. At some indistinct point, Garcia apparently concluded that she had in fact hired Mr. Root because, she testified, she subsequently fired him when she discovered that Root had failed to file an engineering amendment which she had signed and returned to him for filing. G-A Ex. 4, p. 22; G-A Ex. 11, Tr. 1771-2. Based upon the recommendation of Anderson's brother Richard Ozan, Garcia hired G-A's current counsel Donald Martin in September 1985. G-A Ex. 4, p. 5. In the *Blanco, Texas*, proceeding, Garcia explicitly testified that she hired Thomas Root in September or October of 1984 during the first telephone call she claimed she made to him. G-A Ex. 11, Tr. 1738.

18. Garcia testified that it was her idea to set up the corporation with voting and non-voting stock, and that she alone decided what the equity division should be between herself and Anderson. Tr. 1755, 1788-89, 1815. The division of equity was based upon the estimated value of Garcia's time against Anderson's promise to contribute the necessary funds. Tr., 1810-11.

19. In G-A's application, Garcia is represented as owning 100% of G-A's voting stock. The application further states that the applicant corporation would issue non-voting stock, 80% of which will be issued to Anderson. Garcia is identified as the applicant's president, secretary and treasurer. Tr., 1788-89; 1810-11; G-A Ex. 4, p. 12; CBLP Ph. II Ex. 1.

20. Mr. Ronald Baptist testified in the Conroe, Texas, proceeding on June 5, 1986. He described himself as a "middle man" who found broadcast applicants for attorneys and engineers in exchange for a payment. Matias/Wimbish Ex. 11A, Tr. 2198. Baptist testified that he would "line up a job," and then "sub out the work," usually to Thomas Root. He worked with Root "99.9% of the time." Matias/Wimbish Ex. 11A, Tr. 2198. Matias/Wimbish Ex. 12A, Tr. 2215.

21. Baptist testified that he received "cutoff lists" from Washington which specified filing deadlines for television applications in various markets. Matias/Wimbish Ex. 13A, Tr. 2225.

22. Richard Ozan, the brother of Elizabeth Anderson and Dorothy Schulze, had an interest in television allotments in Texas as investment vehicles for his sisters, and this interest was expressed to Ronald Baptist and Thomas Root. Matias/Wimbish Ex. 2A, Tr. 2043-45. When Ronald Baptist received a "cutoff list," he would either forward the list to Ozan or telephone Ozan and describe the available markets and the filing deadlines. If an application was filed for a particular market, Baptist would receive a payment of $2,000.00. Matias/Wimbish Ex. 12A, Tr. 2216.

23. Through Baptist, Ozan learned of the Conroe and San Antonio, Texas, opportunities and told his sisters, Anderson and Schulze, about them. Matias/Wimbish Ex. 2A, Tr. 2041. He advised his sisters to "get someone that they were comfortable with and was a competent person to go into partnership of sorts." Matias/Wimbish 2A, Tr. 2042.

24. Baptist recalled working with Ozan on applications for Conroe, Texas, San Antonio, Texas, Fort Worth, Texas, Memphis, Tennessee, Charleston, South Carolina, Castle Rock, Colorado, Omaha, Nebraska, and Tolleson, Arizona. Baptist testified that Ozan was the only person he ever received payment from with respect to Baptist's work on any of these applications. Matias/Wimbish Ex. 12A, Tr. 2209, 2213-14; Ex. 14A, Tr. 2232-33.

25. In early November 1984, Ozan informed Root that he knew of two persons who had determined to apply for the Conroe and San Antonio allotments. Root responded by a letter to Ozan dated November 7, 1984. CBLP Ph. II, Ex. 12. By the letter, Root transmitted to Ozan two blank applications as well as applicant questionnaires. Root instructed Ozan to have the questionnaires completed by "each of the proposed shareholders," and to have the application executed on page 19 by "the President." Root instructed Ozan that a check for $1,000.00 was to be returned with each signed application. Root also advised Ozan about establishing an applicant checking account, and making sure that each applicant is incorporated prior to the application filing date. Root advised that in order to achieve "maximum integration credit," compliance with local corporate requirements must be maintained. During his testimony in the *Blanco* proceeding, Ozan testified that the applications were to be used for Conroe and San Antonio because the filing deadlines were approaching. Matias/Wimbish Ex. 4A, Tr. 2071, 2073.

26. Upon receiving the letter, Ozan either photocopied it and sent copies to each of his sisters, or he telephoned them and read the letter to them. The letter prompted Schulze to send Root the requested $1,000.00 retainer to "get the relationship going." Ozan expressly acknowledged a payment obligation to Ronald Baptist for his work performed on the Conroe and San Antonio applications; Ozan viewed it as "an obligation that had been incurred on behalf of my family to Ron Baptist." Matias/Wimbish Ex. 5A, Tr. 2077.

27. According to Ozan, the determination to have his sister, Anderson, be a non-voting shareholder in the Conroe applicant was based on advice received from Thomas Root. Matias/Wimbish Ex. 7A. Ozan testified that he know when he received Root's November 7, 1984 letter that his sisters would be non-voting stockholders in the Conroe and San Antonio applications, and that their minority partners would run the corporations. Ozan was aware that the reason the applications were structured this way was to enhance the applicants' integration preference for minority participation. He knew this because Thomas Root had explained it to him. Matias/Wimbish Ex. 4A.

28. Thomas Root testified in this proceeding on May 2, 1988. Root had also appeared as a witness in the *Blanco, Texas*, proceeding in 1986. In the instant proceeding, Root testified that in late 1984, Ozan, Baptist, and Root met in Washington, D.C. to discuss the preparation of some broadcast applications. Tr., 1424-25. Root and Baptist had worked together on various broadcast projects since 1982, with Baptist sometimes acting as a "consultant," and sometimes as an applicant. Tr., 1428. According to Root, Baptist introduced Root to Ozan at the meeting and indicated that Ozan had retained Baptist to work on some applications. Tr., 1468, 1494.

29. Root testified that in early 1984, Ozan informed Root that two applicants had decided "to go forward." Tr. 1432. Ozan requested Root to begin the preparation of the necessary applications. Tr. 1433. Root recalled that one of the applications which Ozan requested Root to prepare was for Conroe, Texas. Tr., 1431-32. In the *Blanco* proceeding, Root testified that Ozan supplied him with the information necessary to complete the application by telephone. Tr., 1485, 1509. Root did not recall having acted upon the instructions of anyone other than Ozan in preparing the G-A application. Tr., 1513-14.

30. Prior to the filing of the G-A application, Root considered Ozan, rather than G-A, to be his client. Tr., 1500. He looked to Ozan for payment for his legal services. Tr. 1496-97. Root could not recall how the application was sent to Garcia for her signature, and could not recall whether he ever sent her a blank application. Tr., 1437-38.

31. On the same date that the G-A application was filed (November 29, 1984), Root filed an application on behalf of the Salinas-Oatman Corp. for a construction permit for a new commercial television station at San Antonio, Texas. The Salinas-Oatman application stated that 100% of its voting stock would be owned by Gloria Salinas-Oatman. The application further stated that the applicant corporation would issue non-voting stock, 80% of which would be issued to Dorothy Ozan.[3] The application identified Gloria Salinas-Oatman as the applicant's president, secretary and treasurer. MMB Ex. 1; Tr., 1790.

32. In the Blanco proceeding, Root testified that the ownership structure of G-A was decided upon in discussions he had with Richard Ozan. More specifically, it was Root's suggestion that the corporation issue non-voting stock. Tr., 1505-07. Root testified that the information concerning the organization of the Conroe applicant came exlcusively from Ozan. Tr., 1509.

33. Root testified that he ceased his representation of G-A because a broadcast station owner in Ohio, whom Root had previously represented, was a principal in another of the Conroe, Texas, applications and Root did not feel comfortable representing a competing applicant. Tr., 1470. Root suggested to Ozan that other counsel be retained to represent G-A and recommended G-A's current counsel, Donald Martin. Tr., 1471. Root testified that he had no recollection of Garcia firing him, and that he would have remembered such an event had it occurred. Tr., 1518-1520.

IV. CONCLUSIONS OF LAW

34. This case was remanded by the Review Board for a determination of whether JoAnn Garcia, the sole voting stockholder of G-A Communications, Inc., lied to, misrepresented facts to, or lacked candor with the Commission in testimony she gave as a witness in the *Blanco, Texas*, proceeding. Her testimony in the *Blanco* proceeding was similar to the testimony she provided in this proceeding.

35. In the instant proceeding, as in the *Blanco* proceeding, Garcia testified that she was the primary mover behind the G-A application. She testified that it was she who initiated the process by telephoning the Commission and obtaining copies of the application form and other filing information. Garcia also claims that she was the person who determined that she would hold 20% of G-A's equity and Elizabeth Anderson the remainder. She also claims that it was she who hired G-A's attorney Thomas Root, and that it was she who fired him upon becoming disenchanted with his services.

36. The testimony given in the Blanco proceeding by Root, Ozan and Baptist is irreconciable with that given by Garcia. Their *Blanco* testimony indicates that it was Ozan's decision to file certain television applications, for his sisters, among them *Conroe* and *San Antonio, Texas*; that Ozan relied on Baptist to inform him of impending filing deadlines for various television markets; that Baptist's fee for providing that information was paid by Ozan; that Ozan informed Root of Ozan's interest in securing applications for Conroe and San Antonio; that Root advised Ozan to use a two stock corporate structure for the applications in order to achieve the best comparative case; that Root obtained the information necessary to prepare the application from Ozan; and, well after the application was filed, Root informed Ozan that he could no longer provide legal representation to G-A because of a conflict.

37. In his *Initial Decision* (Blanco ID), 1 FCC Rcd. 120 (1986), Judge Walter C. Miller rejected Garcia's testimony regarding the circumstances of the filing of the Conroe application as "sheer fabrication" and a "web of lies." Judge Miller found that Garcia testified falsely about having hired Root to prepare the Conroe application; about conversations with and information she claimed to have given Root for the Conroe application; and about having fired Root upon becoming dissatified with his services. Judge Miller found that the motive for Garcia's false testimony was her desire to help Richard Ozan's sister Dorothy Schulze out of the predicament Schulze found herself in in the Castle Rock proceeding.

38. Much of Ms. Garcia's claimed involvement and participation in the G-A application concerns supposed contacts she had with Mr. Root. In the *Blanco* proceeding, Garcia testified that she hired Mr. Root as G-A's attorney in late September or early October 1984 when, by telephone, she spoke with him for the first time. In her later *Conroe* testimony, Ms. Garcia claimed that she did *not* hire Root as G-A's attorney during that first contact, but

merely sought information from him about what she needed to do to file an application and about "what kind of investment this was going to take." Tr. 1780.

39. This conflict in Garcia's testimony is no insignificant matter. If Garcia's *Blanco* testimony on the point could be found to be true, her claims of subsequent contacts with Root concerning the preparation and prosecution of G-A's application might be somewhat more believable. However, Garcia's contradicting testimony about the matter raises the question, not otherwise answered on this record, of just when she believes she hired Mr. Root. If the claimed hiring simply "evolved," as Garcia's *Conroe* testimony seems to suggest, it happened with Ms. Garcia in appalling ignorance of the financial charge to her for that hire (and this, with her having earlier been told that attorneys were "expensive" to hire). It also happened with Mr. Root hiring himself out to someone without knowing what that "client" would be willing to pay. Indeed, Garcia does not claim that she paid Root any money in connection with this alleged hiring. She testified that "the Andersons' paid Root directly."

40. Although Ms. Garcia claimed that she hired Root at the time of her first contact with him, she did not bother to discuss Root's fee, even though she, presumably, had earlier been impressed by the advice that lawyers were "expensive." Although she was not even certain that she wanted to pursue an application at the time, she nevertheless "hired" Root at the time of that first contact. After that first contact and as a result of it, and without any further contact having been made in the interim, Garcia claims she received a package from Root containing a blank application form, a questionnaire, and a cover letter -- but no retainer agreement. Even at this time, she continued to be uncertain about whether she wanted to pursue an application.

41. While some of the foregoing testimony may possibly be viewed as consistent with Garcia's later claim, made in the *Conroe* proceeding, that she did *not* hire Root during that first contact, such a claim runs headlong into Garcia's prior claim, made in the *Blanco* proceeding, that she hired Root at the time of her first contact with him. Garcia's unexplained contradictory testimony fails to establish that Root was hired by her during the first contact she claims to have had with him. That Garcia *never* hired Root is consistent with the corroborated testimony of Root, Ozan and Baptist; her claim that at some indeterminate time, and in some unspecific way, she hired Root as G-A's attorney is consistent only with the possibility that she may have repeated the claim on more than one occasion.

42. Of the two versions of the facts presented, only the version presented by Root, Ozan and Baptist is corroborated, not only internally -- as all three of those witnesses presented virtually the same story -- but by other record evidence as well.[4]

43. Garcia's testimony that she telephoned Root and then hired him is not believed. If Root is to be believed (and he is), it was Ozan who hired Root to prepare the application, not Garcia. Root's version is supported by the fact that by letter of November 7, 1984, he transmitted to Ozan (not Garcia) two blank application forms and questionnaires for use in the preparation of applications for the Conroe and San Antonio markets. The letter stated advice on the preparation of those applications and set forth the amount of Root's expected fee. In the letter, Root also advised Ozan with respect to corporate formalities and the manner in which to preserve maximum integration credit. Plainly, in Root's mind, he was dealing with Ozan on the Conroe application, and the letter corroborates the Root/Ozan/Baptist testimony regarding the attorney-client relationship between Ozan and Root. Ozan's testimony specifically supports Root's. Ozan testified that when he received the package of information from Root, he passed the information on to his sisters, one of whom was G-A's nonvoting stockholder, Elizabeth Anderson. Garcia misrepresented the facts surrounding the hiring of Root in both the *Blanco* and the *Conroe* proceedings.

44. Ms. Garcia's claim that she, after considering the amount of effort she would have to put into the project, independently determined that she would be G-A's sole voting stockholder with a 20% equity interest and Anderson would be the sole nonvoting stockholder with an 80% equity interest, is not believed.[5] The ownership structure of G-A was determined by Root and Ozan acting in concert. Root testified that it was Ozan who wanted a corporation and that it was he, Root, who suggested that the applicant have nonvoting stock. Ozan confirmed Root's testimony by testifying that the decision to make his sister a nonvoting stockholder in G-A was based on Root's advice. None of this involved Ms. Garcia. Given the inherent improbability of Garcia's testimony about the matter, and the contrary testimony of Root and Ozan, it is concluded that Garcia misrepresented when she claimed that she was responsible for determining the ownership structure of G-A.

45. Contrary to her testimony, John Garcia did not fire Thomas Root; she never hired him and he was never hers to fire. In dealing with the G-A application, Root dealt through Ozan. If Root had determined to cease his representation of G-A, he would naturally be expected to inform Ozan of that decision. It is Root's testimony that that is what he did, while recommending G-A's present counsel to Ozan at the time of his resignation. Root's testimony on the point is credited here, and Garcia's is rejected as untruthful. Root's testimony is bolstered by the fact that G-A's present counsel is the counsel who Root says he recommended to Ozan when he resigned his representation of G-A.

46. Motive or intent to deceive is a necessary element in a finding of misrepresentation. *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 1137, 50 RR 2d 1321, 1325 (Rev. Bd. 1982). Truthfulness on the part of applicants and licensees in dealing with the Commission is a fundamental requirement. In its *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1209-11, the Commission observed that it was "authorized to treat even the most insignificant misrepresentation as disqualifying." *See, Mid-Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986), *aff'd*, 5 FCC Rcd 940 (1990); also, *FCC* v. *WOKO, Inc.*, *329* U.S. 223, 227 (1946).

47. JoAnn Garcia's misrepresentations were not insignificant and were deliberately made; she had clear motives for testifying falsely in both the *Blanco* and the *Conroe* proceedings. In the *Blanco* proceeding, one of the questions presented was whether Dorothy Schulze, a sister of Richard Ozan, had an interest in the G-A application. With the G-A application thus in question, Ms. Garcia, who presents herself as G-A's sole voting shareholder, had an interest in showing that she was a real party in interest

in that application. She sought to do this by claiming an active role in the preparation and prosecution of the G-A application, performing those tasks which would be expected of a corporation's sole voting shareholder. By necessity, she had to try to maintain the pose in her later *Conroe* testimony.

V. ULTIMATE CONCLUSIONS

48. JoAnn Garcia misrepresented facts to the Commission in her *Blanco* and *Conroe* testimony concerning her alleged role in the preparation and prosecution of the G-A application. Thus, G-A is not qualified to be a Commission licensee, and its application will be denied. *Washington's Christian Television Outreach, Inc.*, 56 RR 2d 1539, 1545 (Rev. Bd. 1984). Accordingly, IT IS ORDERED that the application of *G-A Communications, Inc.* (File No. BPCT-841129LE), IS DENIED.[6]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] On November 29, 1984, the Salinas-Oatman Corp. filed an application for Channel 60 in San Antonio, Texas (BPCT-841129LF). That application stated that the Salinas-Oatman Corp. intended to issue 80 percent of its non-voting stock to Dorothy Ozan. Dorothy Ozan turns out to be the same Dorothy Schulze who is an applicant, as part of the Schulze-Brigham Partnership, in the Blanco, Texas, proceeding. The Blanco, Texas, application had been filed some four months earlier. These discoveries led to the initial specification, in the San Antonio proceeding, of the Section 1.65 and misrepresentation/lack of candor issues which were tried in the *Blanco, Texas*, proceeding.

[2] Some of these mistakes were said to be the following:

> 1) the original G-A application represented that G-A would issue non-voting stock, 80% of which was to be issued to Anderson. Garcia testified that those were Root's words, not-hers, and that she had advised him differently. G-A Ex. 11, Tr. 1790, 1796-7.
>
> 2) in various places in the application, the applicant name is stated as G-A Corporation, Inc., rather than G-A Communications, Inc. G-A Ex. 11, Tr. 1720-24.
>
> 3) G-A's application contained a negative financial certification, but on the same page there appeared this typed representation: "The applicant will shortly be in a position to so certify." Garcia testified that on the draft application form she had earlier sent to Root, she had queried the following about the financial certification: "I had not finished doing this. What did we need to do?" G-A Ex. 11, Tr. 1744.

With reference to all of these matters, according to Garcia, Root stated to her that the mistakes did not matter and that she should sign the application and return it to him via Federal Express. G-A Ex. 11, Tr. 1725.

[3] Dorothy Ozan is another sister of Richard Ozan.

[4] In its proposed findings, G-A claims that Garica's testimony is corroborated by that of Root, Ozan and Baptist, presummably in important particulars. If G-A truly believes that to be the case, it is very difficult to understand G-A's resistance at hearing to the receipt of the Blanco testimony of Ozan and Baptist in particular (Tr. 1852 - 1854), and its failure to call them as witnesses on its behalf in the Conroe proceeding.

[5] On the same day that Root filed the G-A application for Conroe, he filed an application for San Antonio in which another Ozan sister held a nonvoting interest representing 80% of the applicant's equity. The common denominator between the San Antonio and Conroe applications, which specified identical ownership structures, was Root and Ozan. Although not impossible, it is quite improbable that the San Antonio application would have the same ownership structure as that independently determined by Garcia based, she says, merely on her evaluation of the worth of the effort she would put forth on the Conroe project.

[6] In the event exceptions are not filed within thiry (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application of Alascom, Inc. for authority to acquire and operate a fiber optic cable system between Alaska and Oregon, for the provision of interstate switched and private line services

File No. W-P-C-6520

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: May 13, 1991; **Released: May 13, 1991**

By the Chief, Common Carrier Bureau:

1. Before the Bureau is an application filed by Alascom, Inc. (Alascom) for authority under Section 214 of the Communications Act of 1934 (Act) to acquire and operate a fiber optic cable system between Alaska and Oregon, for the provision of interstate switched and private line services. Comments were filed by the State of Alaska (Alaska) and a Petition to Deny was filed by General Communication, Inc. (GCI).

POSITIONS OF THE PARTIES

2. Alascom requests authority to purchase a fiber cable system between Anchorage, Alaska and Portland, Oregon. The undersea portion of the fiber will be located only between Seward, Alaska and Pacific City, Oregon.[1] The proposed facilities will be the primary means of carrying Alascom's MTS, WATS and other switched and private line (voice, data, video) services between Alaska and the contiguous United States.[2] The majority of the circuits now in use will be rerouted to the fiber cable. [3] The proposed fiber optic cable system will be comprised of one fiber pair contained within 1850 miles of undersea cable; cable landing terminals in Alaska and Oregon; both owned and leased buried fiber optic cable between Seward and Anchorage, Alaska; and leased fiber connecting facilities between Pacific City and Portland, Oregon, with appropriate endlink systems to route interstate traffic between switching centers in Anchorage and various points in the contiguous 48 states. [4]

3. Alascom proposes to purchase the domestic portion (Alaska spur) of the North Pacific Cable (NPC) [5] from Pacific Telecom Cable, Inc. (PTC), a corporation which is 80% owned by Pacific Telecom, Inc. [6] Alascom anticipates that the acquisition and operation of the fiber cable facilities will allow reduction of other interstate service expenses, resulting in significantly reduced annual lease costs for satellite transponder and terrestrial transmission capacity. [7] It also notes that service innovations require digital switching and digital interconnect circuitry. Alascom states that existing microwave and satellite connecting facilities cannot fulfill that need without expensive conversion equipment. There will be no junction or connection which would permit direct international service. [8]

4. Alascom states that its interstate circuit requirements as of the 4th quarter 1990 are anticipated to be as follows:

Switched - Total Requirement	3,240
Pvt. Line - Total Requirement	670
Total Interstate Requirement	3,910

Alascom states most of this requirement will be met by the proposed fiber optic cable system. [9] During the five year period beginning in January, 1991, Alascom expects interstate telecommunication requirements to increase to a total of 4,858.

5. Alascom argues that the cost of the Alaska spur will be considerably less than if Alascom had proposed to construct the project on a stand-alone basis. It states that its share of the proposed undersea fiber cable system will be approximately $55 million as compared to a cost in excess of $100 million if construction of the Alaska spur was undertaken solely by Alascom. [10] It adds that a reduction in satellite transponder requirements has already been reflected in Alascom's purchase contract for its replacement satellite, Aurora II. [11] It states that its accounting will be performed in accordance with Part 32 of the Commission's Rules.

6. GCI has petitioned to deny, or grant conditionally, the Application. GCI believes that if the Commission does not deny the Application, it should grant the application only on the condition that Alascom document its capacity needs in the cable and acquire only the amount of capacity actually required to provide its services on an efficient basis. [12] GCI states that the undersea cable has transmission capacity in excess of Alascom's capacity requirements. GCI, Alascom's principal competitor in the Alaska MTS and private line markets, is concerned that Alascom's purchase of the entire capacity of the Alaska spur will remove that capacity from the competitive marketplace and needlessly frustrate access to the cable by

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[1] Application at 3.
[2] *Id.*
[3] *Id.* at 4.
[4] *Id.* at 6.
[5] *See* Pacific Telecom Cable, Inc., 2 FCC Rcd 2686 (Com. Car. Bur. 1987) (Conditional License) and Pacific Telecom Cable, Inc., 4 FCC Rcd 8061 (1989) (Final License).
[6] Application at 7.
[7] *Id.* at 8.
[8] *Id.* at 4.
[9] *Id.* at 5.
[10] *Id.* at 10.
[11] *Id.* at 10.
[12] GCI Petition at 1.

Alascom's competitors. [13] GCI also stresses that Alascom's assignment of the bulk of the cost of the cable to its MTS rate base will frustrate resolution of the issues in the current Alaska Joint Board proceeding (CC Docket 83-1376) by needlessly inflating Alascom's rate base. [14] It adds that it will also potentially permit Alascom to cross-subsidize competitive Alaska private line services.

7. GCI states that the new undersea cable will have a capacity of 6,048 "compression" equipment. [15] According to GCI, compression equipment increases the capacity of transmission equipment and its use is standard in the undersea cable industry. It states that using the equipment, Alascom could increase the capacity of the cable as much as five-fold. Using today's compression equipment would increase the capacity of the Alascom cable in excess of 30,000 channels, which would likely be higher in the future as compression technology advances. [16] Thus, GCI reasons, Alascom could carry its traffic requirements on fewer than two fully compressed DS-3 circuits - leaving seven empty DS-3 circuits in the Alaska spur. [17] GCI adds that depending upon how satellite backup capacity is acquired, Alascom may incur duplicative costs in providing itself with both cable and satellite capacity when satellite capacity alone would meet all of its requirements. [18]

8. GCI also argues that Alascom will pay its sister company, PTC, approximately 34 million dollars over 25 years for capacity connecting the Oregon landing point with Portland, a distance of approximately 100 miles. It urges that, if others pay for this capacity on the same basis as Alascom, the total rental would be 136 million dollars - yet PTC should be able to construct such a facility for approximately 5 million dollars. [19] GCI states that the Commission should determine the cost of the cable which will be included in Alascom's rate base, and that in addition, the Commission should determine the manner in which Alascom will assign its cable costs, as well as the costs of abandoned facilities, to various services. [20] GCI argues that Alascom has filed a Section 214 application to acquire the entire Alaska spur from PTC. It states that this acquisition from its sister company, without conditions, would necessarily convert PTC's "at-risk" investment to a return-regulated investment of Alascom. [21]

9. Alaska states that it welcomes the introduction of new, state-of-the-art technology and methods of providing communications services to and from the State. [22] The State believes, however, that the application raises some questions regarding capacity requirements and costs that need to be answered before the Commission can make a public interest determination on the application. [23] Alascom responds to these questions in its Response and Opposition (Response). [24]

10. On January 17, 1991 Alaska filed a further comment stating that granting authorization for the fiber optic Alaska spur proposal to move forward is in the public interest. Alaska states thatissues with respect to the separations effects of it and its impact on rates should be considered and resolved by the ongoing Alaska Joint Board.

11. In an *ex parte* presentation, AT&T states that it does not oppose the application. [25] However, AT&T states that the application of signal compression equipment to economize on circuits to be used for MTS/WATS under the current joint arrangement is relevant to Alascom's application. AT&T suggests this be studied in connection with Alascom's application. It adds that spare capacity should be allocated in direct proportion to the cable's valid and efficient assignment between Alascom's Interstate Private Line service and the interstate MTS/WATS service provided jointly between Alascom and AT&T. [26] AT&T argues that the equipment purchased by Alascom, combined with the generic software being supplied by AT&T at Alascom's request, will recognize fax and dial-up data transmissions, prioritize them and allocate required bandwidth so as not to compromise transmission quality. [27] AT&T states that this technique is now used by AT&T on its HAW-4 undersea cable between Hawaii and the mainland, and it works very well. [28] AT&T states it takes no position as to whether Alascom should compress private line and ISDN service, because these services are not subsidized by AT&T. [29] AT&T asserts that it will pay settlements under the joint service arrangement based upon the 50 percent share of the Alaska fiber cable costs which should properly be assigned to the joint service, but will not pay the larger share of cable costs which Alascom proposes. [30]

DISCUSSION

12. *Public Interest.* Most interstate switched and private line traffic between Alaska and the mainland states currently is carried by the Aurora I satellite. [31] The Aurora I satellite reaches the end of its projected useful life in 1991. [32] In order to maintain service to the public, alternate network configurations must be implemented. We find that under these circumstances a rerouting of the Alascom network is justified. However, the question becomes whether the new configuration, as proposed by

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[13] GCI Petition at 2-3. GCI states that it sought unsuccessfully for over a year to purchase capacity in the PTC cable connecting Alaska and the lower 48 states. *Id.*

[14] *Id.* at 3.

[15] *Id.* at 6.

[16] *Id.*

[17] *Id.* at 7. GCI states it is far cheaper, on a per-circuit basis, to provide capacity using compression equipment even though the compression equipment itself increases capital costs. *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] GCI Comments filed January 11, 1991.

[22] Alaska Comment at 2.

[23] *Id.*

[24] Many of the questions raised by GCI are addressed by Alascom in its Response to questions raised by the state of Alaska.

[25] AT&T *ex parte* presentation dated April 4, 1990.

[26] *Id.*

[27] AT&T Reply filed January 11, 1991.

[28] *Id.*

[29] *Id.* at 5.

[30] *Id.* at 6.

[31] *See* In the matter of the Application of Alascom, Inc., W-P-C 4071, FCC 82T-25 (1982).

[32] *See* In the matter of Alascom, Inc., application for authority to construct, launch and operate a space station in the domestic fixed-satellite service, 3 FCC Rcd 6978 (1988).

Alascom, is in the public interest taking into account the service to be provided, the expenditures involved, and the technology proposed.

13. We find that Alascom's projected circuit requirements support the expenditures to be undertaken. It appears projections were made in accordance with standard trunk or circuit forecasting. However, GCI argues that through the use of compression technology, Alascom could reduce its projected transmission capacity requirements. If quality of service can be maintained or improved while decreasing expenditures, the public interest requires the Commission to consider such alternatives.

14. The Bureau sent a letter to Alascom requesting further information regarding compression technology. [33] In its response, [34] Alascom states that projected traffic will not exhaust the uncompressed capacity of the cable for over five years. Alascom states that compression may become necessary in the future and at that time compression technology may be superior to (and less expensive than) what is available today. Alascom notes that currently available compression technology tends to reduce fidelity which can reduce quality of service especially for applications such as switched data, facsimile, SS7 and ISDN. [35] It states that in a market which demands increasing levels of service quality, no carrier committed to superior quality would use compression unless necessary. Alascom asserts that it is digitalizing its network and acquiring fiber optic interconnection between Alaska and the lower 48 states so that it can support broadband services, including ISDN, comparable or superior to what is available nationally. [36] Alascom further argues that private line capacity generally is provided uncompressed for use by customers. Alascom states that if it were forced to compress all circuits, it would suffer a severe competitive disadvantage in the private line business as well as for many switched services such as fax, various data services and ISDN. [37]

15. Alascom believes that use of compression has merit for emergency purposes. [38] It states that such use would be for the shortest time possible, consistent with the fact that emergency capacity and quality would be less than the AT&T network standards Alascom observes under normal operating conditions. [39] Alascom states that its planned investment in compression equipment for emergency purposes is $1.8 million. It adds that compression equipment for full-time use as advocated by GCI would cost an additional $1.1 million. [40]

16. Although AT&T states that it has successfully utilized compression in specific instances, it does not indicate whether such use was made at the initial stage of the cable or rather when capacity is strained. Neither AT&T nor GCI has cited any precedent decision where the Commission has substituted its business judgment or technical expertise for that of a carrier and expressly ordered the use of compression technology. We note that AT&T does not directly oppose this application, but rather suggests that subsidy payment issues be decided by the Joint Board. This authorization is expressly conditioned upon the resolution of cost allocation issues before the Joint Board. [41] In addition, although we do not require Alascom to utilize compression technology initially, we expect Alascom to make spare capacity available to GCI and other carriers.

17. Initially a certain amount of capacity on the fiber optic cable system will stand idle while generating an expense to ratepayers. GCI states it has been unable to negotiate purchase of capacity at rates acceptable to it. In order to maximize efficiencies and assure competitive access to the network, we will require Alascom to make available capacity to present and future U. S. carriers on a reasonable and non-discriminatory basis. [42] We expect that negotiation between Alascom and interested carriers will dictate whether access to capacity will be by sale, lease, tariff, or other means. We emphasize that Alascom must negotiate in good faith with other interested carriers to ensure that competitors have reasonable access to the cable capacity. However, the Commission shall retain jurisdiction to reallocate interests in the common carrier system herein authorized. Such a condition is consistent with other undersea common carrier cable authorizations and supports the Commission's competitive entry policies. [43]

18. *Costs.* Alascom states that the cost of the Alaska spur will be approximately $55 million; it adds that if construction of these facilities had been undertaken by Alascom the cost would have been in excess of $100 million. Alascom asserts that the purchase price of the Alaska spur was arrived at through a process of negotiation. [44] It states that the $100 million alternate

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[33] Letter from the Common Carrier Bureau to Alascom dated November 26, 1990.

[34] Alascom Response filed December 11, 1990.

[35] *Id.* at 8.

[36] *Id.* at 10.

[37] *Id.* Alascom attached to its response of December 11, 1990, a supporting affidavit by Federal Engineering, Inc., an independent telecommunications engineering firm. Federal Engineering states that compression tends to reduce the fidelity of a channel -- the greater the degree of compression that is attempted, the lower the fidelity that may be expected to result. It notes that highly compressed channels are unusable for non-speech signals such as "touch tone", modems, and facsimile. It adds that certain services which are inherently digital (*e.g.*, T1, fractional T1, ISDN, and DDS) are fundamentally incompatible with compression techniques. Federal Engineering believes it would be imprudent for Alascom to implement available voice compression technology on the proposed route in advance of actual need.

[38] Alascom December 11, 1990 response at 13.

[39] *Id.*

[40] *Id.*

[41] *See infra* para. 20.

[42] This requirement does not extend to the joint provision of interstate MTS/WATS services by Alascom and AT&T, which will continue to be governed by the proceedures under the joint service arrangement for those services, pending resolution of the market structures issues in CC Docket 83-1376.

[43] *See e.g.*, Order and Authorization for AT&T to construct and operate an Undersea Cable between Florida and Puerto Rico, 3 FCC Rcd 5847 (1988); Order and Authorization for AT&T *et al* to construct and operate an Undersea Cable between Guam and Australia, 5 FCC Rcd 7362 (1990); Order and Authorization for AT&T *et al* to construct and operate a submarine cable system between and among the U.S., Canada, the United Kingdom, France and Spain, 4 FCC Rcd 1129 (1990).

[44] GCI's claim that expenses can be reduced by use of compression technology is discussed *supra*, paras. 13-16.

construction figure is based upon quotes for construction of undersea fiber optic facilities received by Alascom. Nothing in the record rebuts Alascom's assertions that the purchase price of the Alaska spur was arrived at through arms length negotiation. According to Alascom the cost of the entire PTC cable from Japan to Oregon is estimated at between $400 to$450 million; the sale price of the Alaska spur is but a fraction of that cost. In addition, the Alaska spur will allow Alascom to avoid significant costs in microwave system upgrades, lease costs, and the cost of 8 satellite transponders. [45] Further, GCI states that Alascom's acquisition of the Alaska spur from its sister company, without conditions, would necessarily convert PTC's "at risk" investment to a return regulated investment. [46] We note that this authorization is not being granted without conditions but rather conditions are expressly included to assure competitive access and appropriate cost allocation procedures. [47]

19. GCI also argues that Alascom will pay PTCan estimated 34 million dollars over 25 years for capacity connecting the Oregon landing point with Portland. Although GCI does not support this assertion with a method of calculation, Alascom responds that to reach the $34 million figure, GCI must have assumed that Alascom leased backhaul facilities necessary to match the entire capacity of the Alaska spur cable for 25 years. Alascom states that such an assumption is wrong and that it will only lease backhaul facilities as warranted by traffic demands. We find that GCI has failed to rebut Alascom's assertion that connecting capacity will be leased as needed. The $34 million estimate, without a stated method of calculation, cannot be a basis to question whether purchase of the Alaska spur as proposed by Alascom is not in the public interest.

20. *Cost Allocation and the Joint Board.* GCI states the Commission should determine the cost of the cable to be included in Alascom's rate base. Alascom states that accounting for this project will be performed in accordance with Part 32 of the Commission's rules. The appropriate market structure for the Alaska interstate telecommunication market is an issue in CC Docket 83-1376. We have referred that issue to a Federal/State Joint Board pursuant to Section 410(c) of the Communications Act, 47 U.S.C. § 410(c), for a recommendation on, *inter alia*, the appropriate market structure for the Alaska interstate telecommunication market, which includes the appropriate allocation of costs among Alascom's interstate service offerings. Alascom acknowledges that issues of cost allocations, separations, ratemaking and market structure are best addressed before the Alaska Joint Board in CC Docket No. 83-1376. [48] Both GCI and AT&T are concerned that the expense of the project may affect resolution of the issues in CC Docket 83-1376. This authorization is not to be construed to supersede or prejudge any of the issues in that proceeding. Alascom is expected to operate the facilities authorized herein in accordance with any revised market rules adopted in CC Docket 83-1376.

21. *Cable Landing License.* The act entitled "An Act relating to the landing and operation of submarine cables in the United States" (Submarine Cable Act) states that no person shall land or operate in the United States any submarine cable directly or indirectly connecting the United States with any foreign country, or connecting one portion of the United States with any other portion thereof, unless a written license to land or operate such cable has been issued by the President of the United States. [49] The term "United States" as used in the Submarine Cable Act includes the Canal Zone, and all territory, continental or insular, subject to the jurisdiction of the United States. [50] Alascom seeks to acquire by purchase the following segments of the NPC cable: 100% of the circuit capacity of the Seward Landing Station, 420 MBits/s of circuit capacity in the Pacific City Landing Station, and one fiber optic cable pair of undersea cable between the two landing stations. U. S. carriers must generally apply for modifications of the cable landing licenses for submarine cable systems at the time they seek to acquire ownership interests in such cables. [51] In accordance with the Submarine Cable Act, this authorization is conditioned upon Alascom's seeking and obtaining modification of the PTC *Final License* to reflect the acquisitions authorized herein. Such modification of the PTC *Final License* also will subject Alascom to the conditions of the *Final License* for the NPC system. [52]

ORDERING CLAUSES

22. Accordingly, IT IS CERTIFIED, that acquisition and operation of the facilities described in the application of Alascom, Inc., File No. W-P-C 6520, IS REQUIRED by the public convenience and necessity. Therefore, IT IS ORDERED, pursuant to Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Alascom, Inc. IS HEREBY AUTHORIZED to purchase and operate the facilities as proposed in the captioned application subject to the following conditions:

> That the Applicant make available capacity in the Alaska spur Cable to present and future U. S. carriers on a reasonable and non-discriminatory basis; and that the Commission retains jurisdiction to reallocate carriers' interest in capacity herein authorized, as the public interest may require, to accommodate additional carriers or otherwise, and, further, jurisdiction is retained by the Commission over all matters relating to the Applicant's ownership, management, maintenance, and operation of this cable as authorized herein, to assure the most efficient use of the Alaska spur.

23. IT IS FURTHER ORDERED, that this authorization IS SUBJECT TO the outcome of CC Docket 83-1376.

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[45] Alascom Response and Opposition.
[46] Alascom Response and Opposition.
[47] *See infra* paras. 21-22.
[48] *See* Response and Opposition of Alascom at 8.
[49] 47 U.S.C. Section 34.
[50] 47 U.S.C. Section 38.
[51] *See* Puerto Rico Telephone Company, 5 FCC Rcd 100 (Com. Car. Bur. 1990).
[52] *See infra* para. 25.

24. IT IS FURTHER ORDERED, that Alascom shall file an application to modify the *Final License* for the NPC system, 4 FCC Rcd 8061 (1989), to include itself as a licensee of the cable system.

25. IT IS FURTHER ORDERED, that this authorization is issued subject to the terms and conditions of any further proceedings regarding the license issued to PTC under the act entitled "An Act relating to the landing and operation of submarine cables in the United States", 47 U.S.C. Sections 34-39.

26. IT IS FURTHER ORDERED, that failure to notify the Commission in writing within thirty days of the release date of this memorandum opinion and order that the authorization as conditioned is unacceptable will constitute acceptance thereof. In the event of such notification, this authorization is void pending further order.

27. This order is issued under Section 0.291 of the commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2) of the Commission's rules).

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

DA 91-619

In the Matter of	)	
	)	
Policy and Rules Concerning Rates for Dominant Carriers	)	CC Docket No. 87-313
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 16, 1991 ; Released: May 17, 1991

By the Chief, Common Carrier Bureau:

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Attachment A - List of Parties

Attachment B - Documentation and Technical Discussion

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I. INTRODUCTION

1. On March 8, 1991, the Common Carrier Bureau (Bureau) released a Public Notice suggesting service quality reporting requirements for local exchange carriers (LECs) subject to price cap regulation, and soliciting

comments on its proposed reports.[1] On April 10, 1991, 25 parties filed comments; 16 parties filed reply comments on April 25.[2] In this Order we consider the various submissions and finalize the reporting format to be used by price cap LECs beginning with the first report, due June 30, 1991. Attachment A lists parties and filings; Attachment B annotates modifications suggested by the parties or devised by the Bureau; and Attachment C contains the reporting tables.

2. In the LEC Price Cap Order, the Commission considered suggestions that the implementation of price cap regulation for LECs could create cost-cutting incentives that might result in degradation of service quality and diminishing investment in network infrastructure development.[3] The Commission concluded that price cap regulation will provide the LECs with the impetus and opportunity to create and advance a communications network that will keep the United States at the forefront of a worldwide "information economy," and will encourage the LECs in network modernization, advanced applications, and new services, through investment incentives. That Order also reiterated the Commission's commitment to assuring the availability of high quality, innovative communications services and to the development of the telecommunications infrastructure needed to provide these services. The LEC Price Cap Reconsideration Order affirmed this commitment, stressing the LECs' efficiency incentives to modernize the network.[4]

3. In order to evaluate the actual effects of price cap regulation on service quality and network modernization, the Commission decided to expand significantly the monitoring of service quality and infrastructure development. The Commission determined that all price cap LECs (including LECs that elect to be covered by the price cap rules) will be required to submit quarterly service quality reports. Further, local exchange carriers for whom price cap regulation is mandatory[5] will be required to file the

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1 Public Notice, 6 FCC Rcd 1621 (Com.Car.Bur. 1991) (March 8 Public Notice).

2 Attachment A lists parties' pleadings.

3 Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6827-31 (1990) (LEC Price Cap Order).

4 Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Order on Reconsideration, FCC 91-115, released April 17, 1991 (LEC Price Cap Reconsideration Order) at para. 178.

5 The mandatory price cap LECs are GTOC and the Regional Bell Operating Companies: Ameritech, Bell Atlantic, BellSouth, NYNEX, Pactel, SWB and US West.

semiannual service quality information requirements. The mandatory price cap LECs will also be required to submit infrastructure reports annually.[6] The Commission delegated to the Chief, Common Carrier Bureau, authority to establish reporting requirements designed to capture trends in service quality and telephone industry infrastructure development under price cap regulation, and improve and standardize existing reporting requirements for this purpose. The Commission determined what reports are required, and delegated to the Bureau the establishment of particular reporting formats. Pleadings received leading up to the LEC Price Cap Reconsideration Order have been incorporated into the record of the Bureau's reporting proceeding when those pleadings raise issues that were delegated to the Bureau.

4. As stated in the March 8 Public Notice, we are particularly concerned that our reporting requirements be clear and usable, and that the reports we require be reasonably designed to allow the Commission and interested parties to gain a meaningful overview of LEC service quality and infrastructure development under price caps. To that end, we invited comments particularly on our proposed definitions and explanations of the measurements solicited. In developing these reporting requirements, the Bureau attempted to balance the need for data that will accurately reflect trends in service quality and infrastructure development with our goal of minimizing the administrative costs of LECs. The March 8 Public Notice included attachments displaying the proposed reports as the carriers would submit them.

5. Most parties voice support for our efforts to establish reports to monitor price cap LECs' service quality and infrastructure development, although some believe some modification may be needed. While LECs tend to argue that the proposed reporting requirements are overly burdensome, they generally propose minor adjustments or reorganization of the tables.[7] MCI also agrees that the proposed service quality and infrastructure reports meet the goal of achieving a proper balance between adequate and meaningful reports and avoidance of placing useless administrative burdens on the LECs.[8] Other parties argue that the scope of reporting requirements should be broadened. In our discussion here and in Attachment B, we address each of the issues raised concerning our proposed reporting requirements. We first decide service quality reporting issues, then turn to the reporting of infrastructure development. Finally, we address various other issues parties have raised.

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6 LEC Price Cap Order, 5 FCC Rcd at 6827-30, aff'd LEC Price Cap Reconsideration Order at paras. 174-184.

7 See, e.g., USTA Comments at 2-5 and annotated Attachment.

8 MCI Comments at 2.

II. SERVICE QUALITY REPORTS

A. Quarterly Reports

Table I - Interexchange Access Installation and Repair Intervals

6. As presented in the March 8 Public Notice, Table I collected data on installation intervals for both interexchange access service and local service; Table II collected data on interexchange access repair intervals; Table III collected data on local service trouble reports.[9] In the interests of simplicity and clarity, and because most LECs have different operational and reporting systems for local service and for access service, we have decided to reorganize our reports so that Table I includes access service installation and repair intervals, and Table II includes local service installations and trouble reports. The discussion below incorporates this reorganization.

7. Table I, as presented in the March 8 Public Notice, collects information concerning the time interval between the order and installation of circuits from the LEC office to an interexchange carrier (IC) point of presence (POP) for interLATA service. Table I collects the total number of orders or circuits, the percentage of commitments met during the three-month reporting period, and the average interval of missed commitments.[10] The commitment dates for various kinds of installations are published by the LECs for their customers and prospective customers; these lists must now be kept on file with the Commission.[11]

8. A number of parties raise the issue of whether to include local service information in the reports on installation intervals.[12] Our

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9 Although the March 8 Public Notice referred to "Table 1," we will use Roman numerals for the sake of consistency with other ARMIS reports.

10 These categories are separated between switched and special access circuits.

11 March 8 Public Notice, Attachment A, Table I, n. 4. Some commitment dates are established through negotiation on an individual case basis. These will not be filed with the Commission.

12 See, e.g., Florida Comments at 3; NARUC Comments at 7 (contending that installation intervals for local service should be reported). But see BellSouth Reply at 6 (Commission should focus on interstate services). Table 1 as attached to the March 8 Public Notice did not include local service data.

quarterly report should be a combination of the installation interval report suggested in the BellSouth/Rochester plan[13] and the "On Time Service Orders" report we have been collecting from the BOCs since divestiture.[14] In the LEC Price Cap Order, the Commission decided that the BOC semiannual report's installation interval data should be reported quarterly rather than semiannually. According to the Commission, the reports we establish "should provide sufficient information to permit evaluation of LEC performance in areas of most concern to local customers, installing and maintaining their service and completing their calls."[15] Furthermore, we find that we are not jurisdictionally barred from including local service installation interval data in our reporting requirement, continuing a requirement that has been in place for several years.[16] Our regulation of the interstate jurisdiction occasionally requires us to monitor the effects of our regulations on intrastate operations of the carriers.[17] We do believe, however, that combining local service installation reports with the proposed Table I would create some difficulties that we can avoid by creating a separate table for reporting of local service installations and repairs. We have accordingly determined that Table I will record installation intervals and repair intervals for LEC interexchange access service, and Table II will record installation intervals and repair data for LEC local services. See Attachment C.

9. In addition to the issue of the scope of installation interval reports, parties raise several definitional issues. The definitions of switched access and special access, and of circuits and orders, stimulated many suggestions for clarification.[18] To the extent that these clarifications are consistent with the objectives of the Commission in collecting this information, they have been incorporated in the instructions accompanying the tables.

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13 See LEC Price Cap Order, 5 FCC Rcd at 6828.

14 The BellSouth/Rochester Plan reported interstate access installations only. The BOC semiannual report included residential, business/special, and interstate access installations.

15 LEC Price Cap Order, 5 FCC Rcd at 6828, para. 342.

16 Accord NARUC Comments at 7.

17 See, e.g., MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, Establishment of a Program to Monitor the Impact of Joint Board Decisions, 2 FCC Rcd 3298 (1987).

18 These arguments are detailed and addressed in Attachment B.

10. Table II of the March 8 Public Notice addresses interexchange access service Repair Intervals (circuit-specific trouble reports that are referred to the LEC). As discussed above, this information will now be included in Table I, Interexchange Access Installation and Repair Intervals. As proposed, this report seeks to determine the average time interval from the time of the LEC's receipt of the trouble report to the time of acceptance by the IC control office. This information is divided between switched and special access.

11. Comments concerning repair data (Tables II and III of the March 8 Public Notice) fall into two general categories: those suggesting or seeking clarifications of instructions, and those suggesting either a greater or lesser extent of detail.[19] Most of the requests for clarification concern the lack of clarity regarding data on interexchange access service repairs as opposed to local service repairs;[20] we believe those questions are resolved by our reorganization of the reports. To the extent that suggested clarifications will contribute to the value and uniformity of information reported, we have included them in the attached instructions. With respect to the level of detail, we have carefully considered all arguments raised. Our objective is to develop a sufficient amount of information to allow discernment of any trends of service degradation. By specifying too little detail, we could allow indicators of change to disappear; by specifying too much detail, we could create a reporting system that is unmanageable and difficult to use, and that would impose unwarranted burdens on the reporting LECs. We therefore adhere to the level of detail we proposed in the March 8 Public Notice.

12. We have also included in Table I a further breakdown of data in the repair interval report, to include high-speed data lines in the special access category. We had proposed to include data transmission service quality reporting in the Semiannual Reports; the March 8 Public Notice solicited comments on the inclusion of reporting on bit error rate, availability, and error-free seconds.[21] However, we are persuaded for several reasons that the inclusion of high speed data transmission in the repair interval report is a better approach. First, a requirement that LECs record and report these measures is undesirable because it is intrusive on service[22] and very

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19 See, e.g., TCA Comments at 13 (recommending expansion); but see USTA Comments at 31.

20 For more detail, see Attachment B.

21 These comments are summarized and discussed in Attachment B.

22 Accord SWB Reply at 6; TCA Reply at 16-17.

costly.[23] While we believe that reporting on bit error rate, availability, and error free seconds is important, it is also clear that it fails to establish the balance between usefulness and burden that the Commission directed us to seek. Second, including the requirement in the Semiannual Report would make it applicable only to the mandatory price cap LECs, not to all price cap LECs, and would reduce the frequency of reporting from every three months to every six months. Further, we know that such testing and monitoring are available on a tariffed basis, and that the complaint process is available if needed. High speed special access customers who believe they are receiving inadequate service can resort to tariffed testing and/or trouble reports; if they are unable to receive satisfaction on this point with the LEC providing the service (through reference to a quality control biparty discussion, or a regional or national industry group) they can file complaints with the Commission.

13. Finally, we note that the technology is now available and is beginning to be deployed that will allow for non-intrusive monitoring of high speed data transmission. It is likely that such monitoring and reporting will become the norm. As that occurs, we can revisit this monitoring issue. In the meantime, we note with approval the ongoing attempts of various industry forums to reach consensus on realistic and up-to-date standards for high speed data transmission. Presumably it was such services that the Commission included in its exhortation to LECs to accept the incentives of price cap regulation as creating an opportunity to build the national infrastructure.[24] High quality service for DS1 and higher data transmission uses is also within the scope of factors the Commission will consider in its upcoming performance review of price cap LECs and the price cap plan.

Table II - Local Service Installation and Repair Reports

14. We have created a report for local service installations that mirrors the semiannual report's collection of this data; it includes a total number of orders and a percentage of on-time installations. Orders are separated into residence and business. Further, in keeping with our concerns regarding the possibility of distinctions between service quality in rural areas as opposed to urban areas, the report also separates MSA and non-MSA installation orders. This is consistent with our treatment of local service trouble reports.

15. Reporting requirements for local service Trouble Reports were set forth in Table III of the March 8 Public Notice, which requests information

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23 See SWB Reply at 5-12 (estimating industry-wide cost at $1 billion).

24 LEC Price Cap Order, 5 FCC Rcd at 6834-35.

concerning complaints of service quality made by customers or end users to LECs. That report is now incorporated into Table II. The proposed report breaks trouble reports into business and residential and into MSAs and non-MSAs. As noted above, challengers focused on the level of detail and some definitional ambiguities.[25] We have resolved these issues as noted, incorporating such suggested modifications as are useful.

Table III - Trunk Blockage

16. As proposed in the March 8 Public Notice, this table collects information concerning trunk blockage on a quarterly basis.[26] Blocking is measured as a percentage of calls that fail to be completed due to equipment malfunction or inadequate facilities. Blockage will be reported in this report in two measures, for each month of the quarter. Specifically, LECs will report the number of trunk groups that exceed the reporting carrier's servicing threshold,[27] and the number of trunk groups that exceed equipment design blocking objectives.[28] We require data on the number of trunk groups exceeding servicing threshold for one and three months and the number exceeding design blocking objectives for three months.

17. The majority of comments focus on whether servicing threshold and design blocking objective are the best measures of trunk blockage, and address ways to define them.[29] We have considered these suggestions; we are not persuaded that for our purposes here we should use measures other than servicing threshold and design blocking objectives. The Table relies on carriers' tariffed servicing thresholds, and states that design blocking objectives range from 0.5 percent to 1.0 percent.

18. The Commission directed that the trunk blocking data requirement be eliminated from the semiannual reports if that was necessary to avoid redundancy.[30] Although the reports are not identical, we believe that the

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25 For a more detailed discussion, see Attachment B.

26 Trunk blockage reporting was Table IV in the March 8 Public Notice.

27 Servicing threshold is the carrier's interstate access tariff measured blocking threshold.

28 Design blocking objective is the level of blocking for which a trunk group is sized.

29 See Attachment B.

30 LEC Price Cap Order, 5 FCC Rcd at 6828, para. 342.

data required in Table 3 of the quarterly report is sufficient to serve our monitoring purposes, and we accordingly delete trunk blockage reporting from the semiannual reports.

Table IV - Total Switch Downtime

19. The March 8 Public Notice table on Total Switch Downtime seeks information to monitor the number, size, and urban/rural character of switches experiencing a loss of the ability to process calls. The report seeks, inter alia, the amount of downtime in seconds. Information on an incident-by-incident basis is requested for downtime occurrences of two minutes or more. A number of parties offer or request clarification.[31] We have incorporated such modifications as we believe will be helpful; for example, we have clarified the difference between scheduled and unscheduled downtime,[32] and have more clearly defined switching entities. We have also specifically declined to adopt USTA's suggested modification of the definition of downtime to include stable calls.[33] Such a change would restrict the incidence of downtime below the level we seek to capture in this report.

Table V - Service Quality Complaints

20. This Table seeks information on an MSA and non-MSA basis concerning federal and state, and business and residential, service quality complaints.[34] The table explicitly excludes complaints relating to billing, operator services or 900 services.[35]

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31 See SNET Comments at 8; United Comments at 8; SWB Comments at 23.

32 A number of parties suggested that we eliminate scheduled downtime from this Table. Those arguments are discussed in Attachment B.

33 USTA Reply at 14; USTA Comments, Attachment at 8. "Stable calls" are calls that have been processed (under this report's definition) and are merely ongoing. Our definition indicates that a switch is down if it is no longer able to process (i.e., connect) calls, even if existing calls can be maintained. USTA's proposal would narrow the definition of a downed switch to one that was not functioning even to the extent of maintaining an existing call.

34 Service Quality Complaints were proposed in the March 8 Public Notice as Table 6.

35 The suggestion of several LECs to add complaints concerning 976 numbers to the list of excluded services has been incorporated into the attached instructions. Pactel Comments at 11-12; SWB Comments at 23-24; NYNEX Comments at 6. We will not expand the list further, despite requests to do so, since it is clear from the table's heading and requirements that it will

Table VI - LEC Call Set-up Time

21. In the LEC Price Cap Order, the Commission included in price cap LECs' reporting requirements the reporting of post-dial delay, and defined post-dial delay as the time between the dialing of the last digit and the response of a "winkback," or the acknowledgment of signal receipt, from the interexchange carrier.[36] In the LEC Price Cap Reconsideration Order the Commission affirmed the post-dial delay reporting requirement, but stated that ongoing measurement and reporting of post-dial delay using D-ASPEN sampling methods was unwarranted on a cost-benefit basis.[37]

22. It is apparent that definitional and measurement problems have combined to create some difficulty for the implementation of the Commission's monitoring plan. In discussing post-dial delay in the LEC Price Cap Order, the Commission stated that the LECs' arguments against reporting post-dial delay "seem to be predicated on a different, more inclusive definition of PDD (from dialing of last digit to ring or busy signal) than interests us. . ."[38] Since that broader definition of post-dial delay is in use in other Commission proceedings, such as the Database 800 proceeding[39] and the Adjunct Devices proceeding,[40] the confusion is understandable. The Commission made it clear, however, that it was a narrower measure that was wanted in this context. As defined by the Commission and stated in the March 8 Public Notice, the part of the process to be measured for purposes of this monitoring plan is only from

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collect only complaints dealing with service quality.

36 LEC Price Cap Order, 5 FCC Rcd at 6828, para. 344.

37 LEC Price Cap Reconsideration Order at para. 184. D-ASPEN (Bellcore's Digital Automatic System for Performance Evaluation of the Network) is a measuring procedure that was used on a one-time-only, limited-sample basis in a Bellcore study. Any pleadings submitted in this proceeding addressing these issues -- whether post-dial delay reporting should be required, and whether D-ASPEN is the appropriate measurement methodology -- constitute belated petitions for reconsideration of the Commission's determination, and are dismissed.

38 LEC Price Cap Order, 5 FCC Rcd at 6828, para. 344.

39 Provision of Access for 800 Service, CC Docket No. 86-10, 4 FCC Rcd 2824 (1989), recon. pending (Database 800).

40 Southwestern Bell Telephone Co. et al., CC Docket No. 88-287, Order Designating Issues for Investigation, 4 FCC Rcd 2580 (Com.Car.Bur. 1989).

the completion of dialing to the acknowledgment winkback from the interexchange carrier.[41] In order to curtail further confusion or controversy, we will use the more accurate term, "LEC call set-up time," to refer to this part of the process, and the term "post-dial delay" to refer to the entire access period from dialing of the last digit to ring or busy signal.

23. Based upon this mandate from the Commission, we solicited comments on less burdensome means of measuring and recording this time period.[42] We have concluded, based on the filings and on various ex parte presentations, that LEC call set-up time can be calculated from data already required in our Infrastructure Development reports, with only slight modification.[43] Accordingly, the LEC call set-up time report consists of a display of switch deployment and SS7-NI deployment (described infra) from which filing LECs will draw conclusions about LEC call set-up times in their own systems.[44] Because this Table is based on data in the annual infrastructure report, it will be moved to that report as Table III.[45]

B. Semiannual Reports

24. The March 8 Public Notice contains three tables for the semiannual service quality reports. For Table I - Customer Satisfaction, and Table II - Dial Tone Response, we stated that we would use the current semiannual report

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41 LEC Price Cap Reconsideration Order at para. 183.

42 In the LEC Price Cap Reconsideration Order, the Commission directed the Bureau to investigate alternative measurement methods for recording LEC call set-up time, including whether this report could be based on calculations derived from facilities and routing data supplied in the infrastructure reports. LEC Price Cap Reconsideration Order, para. 184.

43 The development of this calculation methodology is discussed in greater detail in Attachment B. The modification of Infrastructure Report Table I is discussed infra.

44 LECs will use the existing Bellcore data on representative LEC call set-up times for different combinations of switches and routing. They will then use their own switch and SS7-NI data to calculate the extent to which each of several such combinations is present in their respective networks. No actual measurement of call set-up time is involved in this reporting, except as it was previously performed by Bellcore to derive the underlying times.

45 Thus, LEC call set-up time data will be collected only annually, and only from the LECs for whom price cap regulation is mandatory.

requirements.[46] No commenter opposed this continuation, and we accordingly leave these requirements unchanged. We stated that Table III - Transmission Quality, will continue to collect the current data, plus information on availability, error-free seconds, and bit error rate, in an attempt to measure data transmission quality. As noted above, we have determined that the best means of monitoring high speed data transmission service quality is to include it in the repair interval data of the quarterly service quality reports, rather than in Semiannual Report Table III.

II. INFRASTRUCTURE REPORTS

25. To monitor LEC infrastructure development under incentive regulation, the Commission requires mandatory price cap LECs to file information annually, including (1) number of central offices by type of equipment (SPC, digital, equal access, SS7, ISDN); (2) number of access lines by type of office (same as above); (3) local loop transmission facilities by type of available channel (baseband, analog, digital, fiber, other); (4) local loop transmission facilities by type of channels in service (same as above); (5) interoffice transmission facilities by type of channels in service (circuits: baseband, analog, digital; carrier links: copper analog or radio, digital copper or radio, or fiber); (6) copper and fiber pairs available at main frames; sheath miles; fiber to users; and (7) gross construction in millions of dollars, including (a) number of access lines, (b) access lines gained, and (c) total gross capital expenditures.[47]

Table I - Switching Equipment

26. In the March 8 Public Notice, the Bureau proposes to collect data on the total number of switching entities.[48] We find that expansion of the switching entity report is necessary. To obtain a thorough picture of newer technologies as they are deployed throughout the network requires a comprehensive record. We discuss specific reporting expansions below.

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46 Table II reporting requirements have been modified to accommodate them to ARMIS. As noted in the March 8 Public Notice, however, Table I, Customer Satisfaction, does not readily lend itself to inclusion in a standardized format. Issues related to this concern are discussed more fully in Attachment B. For the present, Customer Satisfaction will continue to be reported in formats unique to each carrier.

47 LEC Price Cap Order, 5 FCC Rcd at 6829, para. 351.

48 March 8 Public Notice, Infrastructure Table I, n. 2. These issues are discussed in detail in Attachment B.

27. The March 8 Public Notice requests comments on a separate category in the switching equipment table to allow for isolating data pertaining to remotes, which are presently included in the "total switching entities" count. Some parties support this data collection,[49] while the LECs counter that separate reporting of host and remote entities provides little information regarding infrastructure development, and that remotes and hosts are becoming more alike, so that separate reporting is unnecessary.[50]

28. We agree that the line between remotes and host entities is becoming increasingly blurred. Remotes are often technologically similar to hosts, performing the same functions and having the same reliability and trunking. Further, some remotes may be equal in size to, or even larger than some hosts. Some remotes are capable of switching calls within their local calling area if they lose contact with the host. Such remotes are increasingly able to perform the functions of a switching entity; others serve only the simplest functions to extend the reach of the host. Remotes in all their forms are playing an increasing role in the growth of the network. It is because of their growing importance that we deem it essential to track the evolution of remote deployment in the infrastructure reports. We therefore amend the definition of "local switching entities" to specify inclusion of remotes.[51]

29. The March 8 Public Notice also requests comments on collecting data on access tandems, which had previously been excluded from the proposed reports, by technology type, number of trunks, or other classifications. The commenters do not oppose tandem reporting, although some question its value.[52] Since this data provides essential information regarding the deployment of certain technologies and services to customers, tandem entity reporting has been incorporated into the table.[53]

30. The March 8 Public Notice proposes to collect information on CCSS7 deployment in the LEC network.[54] As discussed in the section on LEC call set-

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49 See, e.g., Hawaii Comments at 7.

50 See BellSouth Comments at 16-17; SWB Comments at 14; BellSouth Reply at 16; USTA Reply at 15.

51 See Attachment B for further discussion, Attachment C for the modified Table I.

52 See, e.g., BellSouth Comments at 17; Pactel Comments at 16.

53 See Attachment B for discussion, Attachment C for amended table.

54 March 8 Public Notice, Infrastructure Table I, n. 6.

up time, supra and in Attachment B, we believe that a detailed and accurate reflection of the deployment of SS7 in LEC switches and tandems is essential to our monitoring process, as well as to LEC calculation of LEC call set-up time. We have accordingly strengthened our reporting requirements in this regard.[55]

31. The March 8 Public Notice proposes to collect data on switches and access lines equipped with Integrated Services Digital Network (ISDN) capability.[56] Commenters suggest clarifications and modifications of the Table's definitions;[57] we have incorporated those suggestions as we found them helpful. A LEC equips a switch with ISDN capability and provides interface units and lines from the switch so that the customer may select ISDN services, but the customer chooses whether to make use of the service. Our reporting requirements focus on services the LEC offers, not what the consumer has selected.

32. Other comments urge modifications that would either expand or reduce the reporting requirements.[58] We believe that our expanded reporting of tandems, remotes and host entities, and requirements for reporting LEC provision of SS7 and ISDN capabilities, will provide an accurate picture of the LEC network, and we accordingly decline to adopt these modifications.

Table II - Transmission Facilities

33. Infrastructure Table II collects data on LEC transmission facilities. Some parties propose modifications to the "Total Sheath Miles" and "Interoffice Working Facilities" categories,[59] and to our definitions of circuit links and carrier links.[60] Proposed modifications have been incorporated to the extent that they offer clarification.

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55 See discussion in Attachment B, and modified table in Attachment C.

56 March 8 Public Notice, Infrastructure Table I, n. 7.

57 See, e.g., BellSouth Comments at 19; BellSouth Reply at 13; SWB Comments at 16; NYNEX Comments at 7.

58 See, e.g., AT&T Comments at 4-5; MCI Comments at 4-5. But see SNET Reply at 5-6.

59 See, e.g., New York Comments at Attachment; MCI Comments at 4. But see USTA Reply at 16; SWB Reply at 19.

60 March 8 Public Notice, Table II, nn. 4 & 5.

34. The March 8 Public Notice proposes to collect data on pairs terminated at the main frame and fiber to customers.[61] Some parties assert that those definitions should be clarified or modified.[62] The focus of the LECs' proposals is on the type of service delivered to the customer. As we noted earlier, loop plant data provides information on terminations at the central office. Our purpose in this report is to collect information on terminations at the customer end of the loop. A subscriber loop may begin on one transmission medium as it leaves the central office, but reach the subscriber's premises on a different medium. We have accordingly modified our report to show terminations to customer premises at various data speeds; this should provide an indication of the use being made, and should allow the drawing of conclusions about the size of the customer or the actual number of end-users at a termination.[63]

35. Some parties request other enhancements to various reporting requirements;[64] other parties support the table as proposed.[65] We believe that the report as set forth here will enable us to review LEC investment in transmission facilities.

Table IV - Additions and Book Costs

36. In order to track capital investment, Table IV reports the number of access lines in service, access line gain, and total gross capital expenditures.[66] Various commenters propose changes to this Table.[67] We find,

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61 Table II, nn. 9-11. It proposes to collect fiber strands in central offices (number of individual fiber strands in central offices, n. 9), fiber to buildings (number of buildings equipped by fiber from central office, n. 10), and fiber to customers (number of individual fiber strands to customers other than on fiber trials, n. 11).

62 See, e.g., SWB Comments at 18-19; Pactel Comments at 17; D.C. PSC Comments at 21; SWB Reply at 21-22.

63 Our delineation of different data speeds is based on LEC suggestions, and on the presumption that large customers, in large facilities, will more often require the use of high-speed services.

64 See, e.g., D.C. PSC Comments at 21; SWB Reply at 21-22; SWB Comments at 17-18.

65 See Florida Comments at 5; BellSouth Comments at 19.

66 This table was Table III in the March 8 Public Notice. Because of our shifting the LEC call set-up time into the infrastructure report, however, Additions and Book Costs is now Table IV. Total gross capital expenditures is the dollar amount of investment additions during the current reporting period,

however, that these modifications are unnecessary, and we decline to accept them.

IV. OTHER REPORTING ISSUES

A. Disaggregation of Reporting

37. The LEC Price Cap Order directed that service quality data be filed at the study area level, disaggregated as to switched access and special access. The LEC Price Cap Reconsideration Order considered the arguments of those who urged greater disaggregation, especially as they related to rural concerns. The Commission directed the Bureau to consider these issues, and said that if the Bureau concluded that the level of geographic aggregation or service level detail should be adjusted, such changes are within the Bureau's delegated authority. LEC Price Cap Reconsideration Order at para. 188. The Bureau's March 8 Public Notice proposed MSA/non-MSA disaggregation for three service quality reports (Table I, Repair Intervals; Table IV, Switch Downtime; and Table V, Complaints) and one infrastructure report (Table I, Switching Entities), and solicited comments.

38. The LECs generally argue against the expansion of disaggregation in reporting requirements, stating that this disaggregation is unrelated to the provision of service.[68] Others assert that they do not maintain data according to MSA/non-MSA distinctions.[69] State and user groups, on the other hand, support the disaggregation of data to MSA and non-MSA,[70] and in some cases suggest still further disaggregation, such as to four levels of MSAs.[71]

39. We have carefully considered the views expressed in these pleadings, and have decided not to extend the geographic disaggregation of

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and is defined to be consistent with the Form M and 43-02 ARMIS reports.

67 See, e.g., D.C. PSC Comments at 21-22; but see SWB Reply at 20; USTA Reply at 16.

68 See, e.g., USTA Comments at 9; GTOC Comments at 2-3. The LECs state they provide the same level of service to rural and urban areas.

69 See, e.g., GTOC Comments at 2-3; United Comments at 6.

70 For example, Hawaii supports MSA/non-MSA disaggregation because users' incentives and opportunities to utilize alternatives to LEC access provision differ across geographic areas. Hawaii Comments at 4.

71 The Commerce Department classifies LECs according to size, into 4 categories.

service quality data beyond what was proposed in our March 8 Public Notice.[72] We believe it is important to retain this disaggregation in the four reports noted there, since, if rural service levels and investment levels were to diverge from urban levels, this divergence would likely become apparent in the areas of repair intervals, complaints, switch downtime, and switching facilities. We will not, at present, require disaggregation to the four levels of MSA, nor will we extend the MSA/non-MSA disaggregation requirement to other reports.[73]

40. We will also not require further disaggregation, to wire center or NXX reporting levels, for several reasons. Such reporting would be burdensome and bulky; USTA states that there are 43,000 wire centers in the United States.[74] It would impose a large burden not only on reporting LECs, but also on the Commission, both staff and facilities. Such an expanded reporting requirement could render the reports cumbersome and inaccessible. Further, it fails to meet the Commission's direction to find a balance between the usefulness of data and the costs of providing it. Absent any indication of service degradation, such detailed filing is not justified by the Commission's determination to monitor and evaluate representative service quality indicators. In the LEC Price Cap Order at para. 350, the Commission suggested that it did not believe that very detailed, very disaggregated reporting is necessary. We agree.

B. Standards

41. The Commission stated and affirmed that it saw no present need to establish national standards in view of the existing high level of service quality and of price cap incentives and state monitoring programs.[75] The Commission stated that it would consider developing standards, sanctions,

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72 We note, however, that our requirement of MSA/non-MSA reporting for repair intervals will apply to interexchange access and to local service repair data.

73 On this reasoning we reject also the suggestions of NARUC and various state commissions that reporting be required on an extremely disaggregated basis -- by wire center or by NXX. See, e.g., NARUC Comments at 4-6. We also decline to expand our requirements regarding service level disaggregation. See Boeing Comments at 13-14; TCA Comments at 10-11.

74 USTA Reply at 10.

75 LEC Price Cap Order, 5 FCC Rcd at 6829-30; LEC Price Cap Reconsideration Order at paras. 191-192.

and other enforcement mechanisms, if it became aware that those measures are required.[76] The Commission also directed the Bureau to use this proceeding to investigate the practicability of increasing the uniformity of reporting, and to consider the inclusion in LEC tariffs of LECs' own service quality standards.[77]

42. TCA and Boeing favor disclosure of service standards in the LECs' interstate access tariffs.[78] They argue that a Bureau requirement that the LECs publish their internal service quality standards in their federal tariffs would yield two benefits: first, it would permit benchmarking, and second, it would compel the LECs to justify any reductions in standards, thus impeding the carriers' ability to redefine standards in order to mask service quality problems.

43. The LECs generally argue that standards are not required, either in general (as a national plan) or in particular (as a part of their interstate access tariffs).[79] They argue that a requirement to include service quality standards in their interstate tariffs would be administratively burdensome without any balancing benefit, and that standards are constantly changing and readily referenced.[80]

44. We believe that a requirement that LECs file all service quality standards in their interstate tariffs is not warranted at this time. We agree with commenters who assert that such inclusion would provide a basis for ready benchmarking and would remove uncertainty, but we believe it would also entail considerable administrative burden and lag. Further, the Commission has determined that those is no need at least at present, for it to develope national standards.[81] It appears likely that a requirement that interstate tariffs include service quality standards would lead to various challenges of the standards so filed, with the result that the Commission would be expected to rule upon the acceptability of these standards, and probably to enforce

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76 LEC Price Cap Reconsideration Order at para. 192.

77 LEC Price Cap Reconsideration Order at paras. 191-192 and n.268.

78 TCA Comments at 5-8 (arguing that the LECs' internal standards should be disclosed wherever a report relies on those standards); Boeing Comments at 2-6. See also Michigan Comments at 1-2.

79 See, e.g., BellSouth Comments at 3.

80 See, e.g., Pactel Reply at 7-8; SNET Reply at 9-10; USTA Reply at 5-6.

81 Pleadings and discussion on the issue of national standards are included in Attachment B.

them. This is tantamount to establishing national standards, a result that is not within the range of authority delegated to this Bureau by the Commission. Further, while we believe that a standards requirement might provide certain benefits, we are not persuaded that these benefits cannot be realized through the detailed and thorough monitoring program we have established. We will continue to watch for cause to revisit the proposal, but we will not at this time impose a requirement that LECs file service standards in their tariffs.

C. Small LECs

45. In the LEC Price Cap Order, the Commission expressed its intention to initiate a separate proceeding to consider the unique concerns of small and mid-sized LECs. LEC Price Cap Order, 5 FCC Rcd at 6826-27. In recognition of the differing resources of LECs smaller than the 8 largest LECs, the Commission determined that 2 of its 3 service quality/infrastructure reports would be required only of the 8 largest LECs. Thus, smaller LECs electing price caps file only the quarterly reports. Any further special or different treatment of small and mid-sized LECs is not among the issues delegated to the Bureau for consideration in this proceeding. In the March 8 Public Notice we said that we declined to address the requests of smaller LECs that are regulated under price caps through their affiliation with larger mandatory or electing companies, or that wish to elect caps in the future, to provide lesser filing requirements for them. Until such time as the Commission addresses these concerns directly, we said, all price cap LECs are expected to file the required data, absent a waiver of this requirement. Nonetheless, several parties urge special treatment of smaller LECs in price cap regulation with respect to service quality reporting.[82] The Commission has expressed and affirmed its intention to examine these carriers' concerns in detail in a separate proceeding; in the meantime, all price cap carriers will be required, absent a waiver, to file the mandated reports.

D. Timing and Procedural Matters

46. In the March 8 Public Notice, the Bureau stated our intention to release an Order specifying reporting requirements in time for price cap carriers to file their initial reports on July 1, 1991. USTA suggests that the filing date be modified to accord with current ARMIS filing dates, so that the first filing would be due June 30, with subsequent filings September 30, December 31, and March 31.[83] SNET asks clarification of the timing of report filing, and suggests that the reports use data from the previous

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82 See, e.g., Rochester Comments at 7-9; USTA Comments at 5-7.

83 USTA Comments at 8.

quarter (so that reports filed June 30 would give data for January - March), and that carriers be required to collect and record the required data only from the date of their entry into price cap regulation.[84] USTA states that a July 1 filing deadline for the first service quality reports may not be feasible.[85] USTA cites LEC reliance on the final order in this proceeding, as well as the complexity of providing responses in the ARMIS format, and suggests that the first reports be due 90 days after the release of this Order.[86]

47. We adopt the modification suggested by USTA, and set June 30, September 30, December 31, and March 31 as filing dates for the quarterly reports.[87] We also grant SNET's request for clarification: all quarterly reports will record data from the period previous to the one ending the day before the report is due.[88] In light of USTA's assertions about the difficulty of developing the ARMIS report (and considering our previous experience in this regard), we will grant the request that the first ARMIS filing be due 90 days after the release date of this Order.[89] We will not,

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84 SNET Comments at 9. Accord GTOC Comments at 6.

85 USTA Comments at 7; accord GTOC Comments at 5-6. SNET also requests flexibility in the first required filing, and suggests that the Commission waive all waiver fees for the July 1, 1991 reports and allow the filing just on paper, rather than in a mechanized format. SNET Comments at 9. See also Ameritech Comments at 3 (urging that the Bureau liberally grant waivers of the July 1, 1991, due date for the first service quality reports).

86 USTA Comments at 8. Accord SWB Comments at 13; GTOC Comments at 5; NYNEX Comments at 2; United Comments at 6; BellSouth Comments at 19-20. USTA and SNET argue that filing of historical data should not be required if a carrier's initial filings are waived while it develops new reporting and data collection methodologies. USTA Comments at 7; SNET Comments at 9. Pactel requests an extension of time to complete Infrastructure Table II. Pactel Comments at 16.

87 Semiannual reports will be filed September 30 and March 31. The annual infrastructure report will be filed June 30.

88 The June 30 report will cover January through March; September 30 report will cover April through June -- and so on. Semiannual reports will record data from the previous half calendar year (September report covers January through June; March report covers July through December). Annual reports will cover the previous calendar year. We also confirm SNET's understanding that LECs will be required to compile the required data as from the date of their entry into price cap regulation.

89 Accord TCA Reply at 17-18.

however, grant that extension for the filing of paper copies of the service quality and infrastructure reports due June 30, 1991. For these paper filings, LECs should approximate as closely as possible the format of Attachment C of this Order.[90]

VI. PAPERWORK REDUCTION ACT

48. On July 20, 1989, the Office of Management and Budget (OMB) approved the Commission's proposed information collection requirements contained in the Second Further Notice on LEC price cap regulations. The LEC Price Cap Order contained the final rules modifying the reporting requirements that were proposed in the Second Further Notice, which where approved by OMB. Request for approval of those modifications was submitted to OMB in March, 1991. The Memorandum Opinion and Order adopted here contains specific details regarding the reporting requirements adopted in the LEC Price Cap Order.

49. This Order adopts the specific reporting parameters required to capture trends in LEC service quality and infrastructure development under price cap regulation, and standardizes existing reporting requirements for this purpose. In connection with this Order, we renew our request for review of the Paperwork Reduction Act requirements. The reporting requirements contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to have modified the information collection burden on the public. This modification in the information collection burden has been granted expedited approval by OMB as prescribed by the Paperwork Reduction Act.

V. CONCLUSION AND ORDERING CLAUSES

50. The reports adopted here, and attached to this Order, were developed pursuant to a delegation of authority by the Commission in the LEC Price Cap Order. The Commission directed this Bureau to create reporting requirements that balance the need for data against the burden imposed on the reporting LECs. The Commission said that the price cap plan creates incentives that encourage LECs to maintain and increase the current high level of service quality, and to invest in the network to modernize it and increase

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90 We reject Pactel's suggestion that the reporting requirements expire at the first price cap review. Pactel Comments at 4-5. Our monitoring plan will be examined at that time to determine if it should continue and in what form. Any decision on those issues now would be premature. We also reject SNET's proposal that we waive all waiver fees for the June 30, 1991 reports. SNET Comments at 9. We believe that the extension of the filing date for ARMIS, together with the flexibility we are allowing on some of the filing requirements, will give LECs ample room while maintaining a reasonable filing expectation.

its capacity and capabilities. The Commission recognized, however, that some parties believe price cap incentives could operate in a different way -- to encourage LECs to cut funding for maintenance and repair, and to decrease their investments in the infrastructure. To assure that this does not happen, and to provide an information base to allow for a full evaluation of LEC performance under price cap regulation, the Commission directed that all price cap LECs will file quarterly service quality reports, and that mandatory price cap LECs will file semiannual service quality reports and annual infrastructure reports.

51. We have developed the attached reports with these policies, and the Commission's explicit directions, in mind. It is our intention, and the Commission's, that these reports be useful and complete without being unduly burdensome. It is also our intention that our consideration of service quality and infrastructure reporting is not terminated with the adoption of this Order. The Bureau, and the Commission, may find it necessary to revisit these matters periodically, for example to modify reporting requirements as technology and the industry change. We will also be intent on evaluating these reporting requirements as they are put into practice, and as the ARMIS database is developed. Finally, as noted herein, the Bureau and the Commission stand ready to revisit the issues of geographic and service disaggregation, LEC call set-up time, trunk blockage reports, fiber deployment, and other reporting requirements, if reevaluation is warranted. In the meantime, we believe that the attached reports represent a fair balance between the need for service quality and infrastructure information, and the burden on price cap LECs to supply it.

52. Accordingly, IT IS ORDERED that all local exchange carriers subject to price cap regulation WILL FILE on June 30, 1991, service quality information in the format of the quarterly reports attached here, modified to the extent permitted herein.

53. IT IS FURTHER ORDERED that these carriers WILL FILE the same data, in the ARMIS format, on August 19, 1991.

54. IT IS FURTHER ORDERED that the eight local exchange carriers mandated to be regulated under price caps, the Regional Bell Operating Companies and GTE Telephone Operating Companies, WILL FILE on September 30, 1991, service quality reports in the ARMIS format of the semiannual reports attached here, modified to the extent permitted herein.

55. IT IS FURTHER ORDERED that the eight local exchange carriers mandated to be regulated under price caps, the Regional Bell Operating Companies and GTE Telephone Operating Companies, WILL FILE on June 30, 1991, infrastructure development reports in the format of the annual reports attached here, modified to the extent permitted herein, covering the 1990 calendar year.

56. IT IS FURTHER ORDERED that the eight local exchange carriers for whom price cap regulation is mandatory WILL FILE the same infrastructure development data, in ARMIS format, on August 19, 1991.

57. IT IS FURTHER ORDERED that the eight local exchange carriers mandated to be regulated under price caps, the Regional Bell Operating Companies and GTE Telephone Operating Companies, WILL FILE no later than September 30, 1991, infrastructure development reports in the format of the annual reports attached here, modified to the extent permitted herein, covering the 1989 calendar year.

58. IT IS FURTHER ORDERED that these reports SHALL BE FILED with both the Industry Analysis Division and the Accounting and Audits Division of the Common Carrier Bureau.

59. IT IS FURTHER ORDERED that the motions for acceptance of late-filed pleadings ARE GRANTED.

60. IT IS FURTHER ORDERED that the requests for extension of time to file reports in ARMIS ARE GRANTED to the extent indicated herein, and ARE OTHERWISE DENIED.

Richard M. Firestone

Richard M. Firestone
Chief, Common Carrier Bureau

ATTACHMENT A

Comments were filed by:

Ameritech Operating Companies (Ameritech)
American Telephone and Telegraph Company (AT&T)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
Boeing Computer Services (Boeing)
Central Telephone Company (Centel)
Cincinnati Bell Telephone Company (CBT)
D.C. Public Service Commission (D.C. PSC)
Florida Public Service Commission (Florida)
GTE Telephone Operating Companies (GTOC)
State of Hawaii (Hawaii)
International Communications Association (ICA)
Independent Data Communications Manufacturers Association (IDCMA)
MCI Telecommunications Corporation (MCI)
Michigan Public Service Commission Staff (Michigan)
National Association of Regulatory Utility Commissions (NARUC)
New York State Department of Public Service (New York)
New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
Pacific Bell and Nevada Bell (Pactel)
Rochester Telephone Corporation (Rochester)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWB)
Tele-Communications Association (TCA)
United Telephone Systems Companies (United)
United States Telephone Association (USTA)

Reply comments were filed by:

Computer Software and Services Industry (ADAPSO)
Allnet Communication Services, Inc. (Allnet)
AT&T
Bell Atlantic
BellSouth
Boeing
Centel
Hawaii
MCI
NYNEX
Pactel
SNET
SWB
TCA
United
USTA

Attachment B
Documentation and Discussion
Price Cap LEC Service Quality and Infrastructure Monitoring

I. SERVICE QUALITY REPORTING

A. Quarterly Reports

Table I - Installation and Repair Intervals (Interexchange Access)

a. local service

Florida states that the tables should be modified to include more basic local service data.[1] BellSouth opposes the inclusion of local service data, stating that price cap regulation extends only to interstate access services.[2] Pactel states that the Table's footnotes should be changed if it is not only interstate access data that is being gathered.[3] The issue of local service reporting is addressed in the Order at para. 8.

b. "orders" or "circuits"

Table I directs parties to enter the total number of orders or circuits. Some parties challenge our use of "orders or circuits" in Table I, and state that these terms are not interchangeable.[4] We agree that the terms "order" and "circuit" are not interchangeable, but we note that some LECs record circuits, while others record orders. We direct LECs to file either Total Number of Orders, or Total Number of Circuits, with an explanatory footnote.

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1 Florida Comments at 3; see also United Comments at 7-8.

2 BellSouth Reply at 6.

3 Pactel Comments at 6.

4 The D.C. PSC suggests that LECs should report orders rather than circuits, reasoning that a single order for 24 circuits might be reported as '1' by one LEC, while another LEC might report '24.' D.C. PSC Comments at 4. BellSouth agrees that one order may include several or many circuits, but argues that reporting circuits would provide a higher degree of accuracy. BellSouth Reply at 6.

c. missed commitments

Various arguments are made regarding the definition of commitment date, as well as what a "missed" commitment means.[5] SNET states that it is currently unable to provide "average missed commitment" in switched and special access categories.[6] Pactel claims that it will be unable mechanically to track installation intervals before July 1, 1991, but offers to provide delay days, which Pactel believes to be a better measure.[7] SWB suggests that missed commitments be defined in business days.[8]

Installation interval reports in the semiannual reports consisted of percentage of commitments met, but did not include average interval of missed commitment. We are directing LECs to record an average (in days) of missed commitments, but we will allow a reasonable period of time for those LECs that need to make adjustments to their data collection programs in order to capture this data. Such LECs should enter "0" in the report, with an explanatory footnote.[9]

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5 IDCMA asserts that "commitment date" should be revised to "original commitment date." IDCMA Comments at 8; but see BellSouth Reply at 8 (arguing that "original commitment date" is meaningless, since any change in commitment date is made only with the concurrence of the customer). Pactel contends that we should exclude from this count any commitments missed because the customer was not prepared to receive service on the commitment date. Pactel Comments at 7.

6 SNET Comments at 5 (noting that it is modifying computer programs in order to capture this data); see also USTA Comments at 11 (noting that several carriers are in this position).

7 Pactel Comments at 5-7. Pactel notes that the report as proposed will not truly demonstrate changes in service provisioning, because a carrier could lengthen its commitment periods beyond the published standard, without any lengthening of provisioning time showing up on the record. Pactel suggests that a measurement that compared average commitment intervals with average installation intervals would give the Bureau a better idea of actual installation service quality. Other parties agree that our reporting should allow a ready comparison of installation intervals and installation commitments. TCA Comments at 8; Hawaii Comments at 5. But see BellSouth Reply at 7 (asserting that such reporting would be meaningless). Hawaii notes that under the measurement proposed, LECs have complete flexibility regarding the date established for installation.

8 SWB Comments at 19. Accord USTA Comments at Attachment. But see D.C. PSC Comments at 4 (arguing that all calendar days should be counted).

9 We expect that all LECs will file complete data in the format specified

We have directed LECs to file their installation interval lists with the Bureau. These will be filed not in the ARMIS database but in hardcopy, with both the Industry Analysis Division and the Accounting and Audits Division, at the time of the initial filing on June 30, 1991. Should a LEC change any intervals, that LEC will file the new intervals, with an explanatory cover letter, no less than 30 days before the effectiveness of the change. LECs will calculate missed commitments from these filed lists of intervals, unless a new commitment date is set at the customer's request. With regard to suggestions that we create a measure to compare installation intervals with installation commitments, we agree that such measurement might be useful, but we will not incorporate it at this time. The fact that LEC installation intervals will be on file and publicly available means that this kind of comparison can be made. If our monitoring of installations reveals any degradation, such a comparative measure might appropriately be added.

d. switched access and special access

Footnote 1 of the March 8 Public Notice defines "switched access" as "circuit from the local exchange carrier Office to the interexchange carrier point of presence for Feature Group B, C, or D interLATA service." D.C. PSC suggests replacing the term "interLATA" with "interstate."[10] USTA suggests that the definitions given for switched access and special access, which state that they apply throughout the report, apply instead only to Tables I and II, since a broader use of this definition will produce confusion.[11] USTA also believes that all footnotes should be amended to change references to "interexchange carrier" to "interexchange carrier/customer."[12] We believe

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no later than the December 1991 report. LECs that currently record some applicable measurement, such as Pactel's measurement of delay days, or other LECs' hours, should enter that measurement and provide an explanatory footnote. GTOC states that it is unable to provide the required data in the given format on a historical basis. GTOC also states that Contel will collect this data manually, so only composite or aggregate data may be available initially. GTOC Ex parte of May 6, 1991. Because they have not previously maintained the data required in the semiannual reports, and have technical limitations to overcome, GTOC and Contel should file representative data, with explanatory footnotes, beginning June 30, 1991.

10 D.C. PSC at 3. (since both interLATA and intraLATA traffic are carried on the same circuits, and the term "LATA" excludes some areas served by independents).

11 USTA Comments at 11-12. Accord Pactel Comments at 6.

12 USTA Comments at 12. See also SWB Comments at 19 (asserting that not all

these changes add clarity, and have accordingly incorporated them. D.C. PSC requests that the definition of special access be expanded.[13] We do not see a present need to expand the scope of the reporting, and we accordingly decline to adopt these proposals.

Table II - Local Service Installation and Repair Reports

Several parties raise issues having to do with the mismatch of measurements required for local service and access service in the repair reporting requirements.[14] We believe that these problems have been resolved by our splitting the reports for access service and local service. Other parties argue that the level of detail and the amount of data required in the repair reports should be increased.[15] The LECs oppose such suggestions as burdensome and unnecessary.[16] We believe that the reporting we are requiring will be adequate to our monitoring purposes, and we therefore decline to expand it further. LECs will file local residential and business installation intervals as well as the interexchange access installation intervals discussed above.[17]

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customers of access service are ICs, and revising "IC POP" to "interexchange customer POP").

13 D.C. PSC Comments at 4. D.C. PSC would include dark fiber and all other facilities supplied by LECs to interexchange carriers, not just to the IC point of presence (POP). IDCMA requests clarification that DDS means digital data service. IDCMA Comments at 8. It does.

14 See, e.g., D.C. PSC Comments at 4-5 (concerning the source of trouble reports); United Comments at 7-8 (concerning whether trouble is found in customer or interexchange carrier equipment); USTA Comments at 13 (recommending the addition of "Local Repair Bureau" to the heading); accord Pactel Reply at 8, 12. IDCMA Comments at 8 (stating that footnote 2 is "too ambiguous for comment").

15 See, e.g., TCA Comments at 13 (proposing further disaggregation); Florida Comments at 3-4 (requesting the inclusion of more data); Hawaii Comments at 3-5 (generally seeking expansion of data requested). For example, TCA urges the Bureau to modify the Trouble Report in order to add the LECs' internal standards for trouble reports per 100 access lines. TCA adds that it believes performance data are collected for individual circuits and that circuits and particular services might be correlated. TCA Comments at 11-13.

16 SWB Reply at 31; Pactel Comments at 9; USTA Comments at 13-14; NYNEX Comments at 5.

17 GTOC states that it is unable to provide local service installation

Table III - Trunk Blockage

In modification of the semiannual trunk blockage report, we will require quarterly reports on trunk groups exceeding the LEC's tariffed servicing threshold (for 1 and 3 months) and number of groups exceeding the design blocking objective (for 3 months). Several LECs offer suggestions regarding the definition of servicing threshold and the range of design blocking objectives.[18] The Table as proposed requires reporting carriers to disclose the standards used and any changes they may from time to time make in such standards, and states that design blocking objectives range from 0.5 percent

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dates in the June 30, 1991 filings, and that some of its filed data for this table and others will consist of approximations, because of the need to convert data to a study area basis. GTOC Ex parte of May 6, 1991. GTOC will be allowed to file a "0" with an explanatory footnote for its June 30, 1991 local service installation data, but must provide at least an approximation of this information by the time of the August 1991 ARMIS filing. Further, while we will accept appropriately footnoted approximate filings from GTOC for the first quarterly filing, GTOC must file actual study area data thereafter.

GTOC states that Contel is similarly hampered, historically and technically, and will require substantial modifications and consequent time delays to complete Table II. Contel should file the most representative data available, with explanatory footnotes, beginning June 30, 1991, and will be required to file standard data and format as of December 31, 1991.

18 See, e.g., USTA Comments at 14 (endorsing the T1Q1 discussion of servicing thresholds and range for design blocking objectives); SWB Comments at 21 (opposing the use of design blocking objective as a performance criterion on Common Transport groups and endorsing the statement that "if the Measured Blocking Threshold on a trunk group does not exceed the appropriate threshold within Table 7.3-1 and 7.3-2 (Measured Blocking Threshold), the trunk group is considered to have met its design blocking objective"); Pactel Reply at 12 (endorsing elimination of design blocking objective as a reporting requirement); but see TCA Comments at 8-9 (urging disclosure of LEC internal standards). With respect to servicing thresholds, we have noted the Interexchange Carriers Compatibility Forum (ICCF) and the T1Q1 Industry Forum discussions. March 8 Public Notice, Quarterly Service Quality Table IV, n. 6. These forums have produced the standards currently in use for the RBOCs' semiannual reports.

to 1.0 percent.[19] Other comments suggest various clarifications that have been incorporated as indicated.[20]

TCA states that although servicing thresholds are included in the LECs' tariffs, it would be useful to reference them, and the design blocking objective, in the service quality reports also.[21] TCA also suggests that LECs note the amount by which the trunks exceeded these standards, not just the fact that they did exceed them.[22] We will not require LECs to file their servicing thresholds here; it seems to us adequate that these standards are included, and readily available, in the LECs' tariffs. We agree, however, that the LECs should include their design blocking objectives in these reports, and we direct them to do so in a footnote to Table III. Finally, while we agree with TCA that the Trunk Blockage Table would be more informative if LECs indicated the extent of any exceeding of the standards, rather than the mere fact of it, we will not require such reporting at this time. Our primary objective, under the Commission's delegation, has been to unify the reports and to implement their their filing in the ARMIS data base. Expansion and other modification of the reporting requirements are beyond our immediate purposes.

Table IV - Switch Downtime

Table IV requires reporting of switch downtime by switch size and by MSA/non-MSA. It also requires complete identification of each incident of more than 2 minutes' duration. Several LECs request clarification of the reporting requirements or definitions we proposed.[23] Others assert that they

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19 Accord BellSouth Comments at 9; USTA Comments at 14; BellSouth Comments at 8-9. LECs file their servicing thresholds in their interstate access tariffs; any change in these standards is thus subject to normal tariff review.

20 We continue modifications adopted supra; see, e.g., NYNEX Comments at 6; Pactel Comments at 10 (recommending deletion of reference to interexchange carrier points of presence). GTOC states that Contel does not measure trunk blockage, and will require a period of time to develop that capability, and to compile the historic data required here. GTOC Ex parte of May 6, 1991. We will require that Contel begin recording trunk blockage data, at least in a sample format, as of July 1, 1991, so that it can file Table III as of December 31, 1991.

21 TCA Comments at 8-9.

22 TCA Comments at 9 n.10; accord D.C. PSC Comments at 11-12.

23 SNET Comments at 8 (seeking clarification of the treatment of remote

are unable to provide the requested data.[24] For purposes of this report, we will use the definition of remotes that we use in Infrastructure Table I - see infra. Thus, remotes with stand-alone capacity will be counted as switches for reporting of switch downtime.

Hawaii suggests that LECs be required to report switch degradation, arguing that situations such as a switch maintaining connections while refusing to establish new connections, or a switch refusing incoming calls but having outgoing calls made through a switching center, should not go unrecorded.[25] USTA opposes this proposal as unnecessary and seeks to limit the switch downtime report by adding "including stable calls" to this definition.[26] As stated in the Order at para. 18, we reject USTA's addition of "including stable calls."

Table V - Complaints

No comments were received on this subject.

Table VI - LEC Call Set-up Time

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switch units for reporting purposes); United Comments at 8 (seeking clarification that pair gain devices are excluded from the definition of "switches"); SWB Comments at 23 (seeking clarification of the meaning of "total number of switches;" i.e., whether the report seeks total number of switches broken down by category or total number of switches with downtime broken out by category); USTA Comments at Attachment 8; BellSouth Reply at 9 (suggesting that the definitions of scheduled and unscheduled downtime are unclear).

24 See, e.g., BellSouth Comments at 10; SNET Comments at 7; Pactel Comments at 10-11. Florida states that it receives reports from LECs on an ongoing basis whenever a major service interruption occurs. Florida Comments at 4. GTOC states that Contel does not track switch outages of less than 2 minutes' duration. GTOC Ex parte of May 6, 1991. Contel must report all switch downtime incidents of more than 2 minutes' duration, as required, and must develop tracking of shorter incidents so that it can file such data beginning December 31, 1991. Contel may, of course, request a further delay of this reporting requirement if it is unable to collect such data for a December 31, 1991 filing.

25 Hawaii Comments at 5.

26 USTA Comments, Attachment at 8.

As discussed in the Order at paras. 21-23, the post-dial delay report is replaced with the LEC Call Set-up Time Report, which is included at infrastructure Table III, infra.

B. Semiannual Reports

Table I - Customer Satisfaction

In addition to the comments, we rely upon a staff report reflecting the semiannual reports of the RBOCs since divestiture,[27] in developing the semiannual report tables. We stated that Table I, Customer Satisfaction, would remain unchanged for the time being, as it is not susceptible to standardization and inclusion in ARMIS. Most of the comments on this table concerned the need to standardize information.[28] We realize that customer satisfaction surveys are designed by individual carriers with idiosyncratic needs and interests, and we have not required LECs to follow a standard format in these surveys. This has resulted in the use by the RBOCs of a very summary, somewhat standardized reporting format for purposes of the semiannual report. The Commission has directed the Bureau to undertake a proceeding that seeks greater uniformity of data so that carriers can more easily be benchmarked. We have not yet done so with regard to the customer satisfaction report. It will thus continue in its present form until such time as we revisit the issue and attempt to devise a new format that would convey more information without pushing all LEC customer satisfaction surveys into a narrow mold.

Table II - Dial Tone Response

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27 "Update on Quality of Service for the Bell Operating Companies," Kraushaar, Industry Analysis Division, Common Carrier Bureau, June 1990.

28 GTOC Comments at 4-5. GTOC asserts that its customer satisfaction measurement system contains information that is more useful than that proposed by the Bureau, and that customers will more readily indicate "overall satisfaction" than they will "excellence in overall quality." GTOC also states that Contel will be unable to provide any of the semiannual reports until after it is merged operationally with GTOC. GTOC Ex parte of May 6, 1991. Since Contel as a separate entity would not be required to file these reports, it is only its changed ownership that makes it susceptible to the requirements here. We do not believe that the integrity of the reporting plan will be reduced if we grant Contel temporary relief from this requirement during the transitional phase of its operational merger with GTOC, and this relief is accordingly granted.

We did not solicit comments, and few were received, on the dial tone response report.[29] While it has been mentioned in other contexts as being anachronistic, and although it takes two steps back from the underlying data,[30] no commenter challenged it. We are accordingly leaving the dial tone response report unchanged.

Table III - Transmission Quality

The transmission quality report also remains unchanged, although the March 8 Public Notice suggested the addition of high speed data transmission reporting to this table. As discussed in the Order at paras. 12-13, we have decided to monitor high speed data transmission quality through inclusion of an additional measure in the repair interval report, Table II of the Quarterly Service Quality Report. We will summarize and address high speed data transmission quality issues here, however, since they were filed in this context.

While several parties support the inclusion of information on bit error rates and availability in the semiannual transmission quality report,[31] the LECs generally oppose such measurements.[32] LECs argue that such measurements are "intrusive," since service over tested facilities must be interrupted for the duration of the test, and that testing may take up to twenty-four hours.[33] USTA notes that these measures are currently under consideration in the T1Q1 Technical Subcommittee of the Exchange Carriers Standards Association (ECSA),

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29 BellSouth asserts that it can continue to report dial tone response as it appears in the semiannual service quality reports. BellSouth Comments at 12. Florida states that its Schedule 9 requires this data and also requires central office location, NXX and equipment type. Florida Comments at 5.

30 The underlying measure is the length of time before dial tone; the report asks whether a certain percentage of end offices meet that test a certain percentage of the time, rather than asking for a measure of average dial tone response, for example.

31 Boeing Comments at 13; TCA Comments at 12-13; IDCMA Comments at 1-2; ICA Comments at 4.

32 D.C. PSC Comments at 18. USTA states that LECs cannot provide data on availability, error-free seconds, and bit error rate as propsed by the Bureau. USTA Comments at 17; accord SWB Reply at 5; Pactel Reply at 15; BellSouth Reply at 15.

33 See, e.g., BellSouth Reply at 15; BellSouth Comments at 13; SWB Reply at 14-15.

which is defining performance parameters and measurement methods and will address the actual performance limits for each of the defined parameters.[34]

Some LECs argue that they can be held accountable for transmission quality only when they control the circuit end-to-end, and even then they exclude problems which may be due to customer-owned CPE.[35] Centel argues that it will be difficult to measure or quantify transmission quality for the semiannual reports, since there are no standards, and since analog and digital switches would have to be judged on different standards.[36] Pactel denies that it currently can track error free seconds and bit error rate, and suggests not collecting this data.[37] SWB claims that data transmission service quality reporting will not be economical until most of the network is digital.[38]

D.C. PSC asserts that there are standards developed by ANSI for transmission quality.[39] IDCMA maintains that our quarterly reports should include "error-free seconds" as defined in BellCore publication TR-NPL-000341.[40] ICA argues that more specification is needed in the reporting requirement for data transmission quality. Noting that the March 8 Public Notice proposes to measure availability, error-free seconds, and bit error rate, ICA asserts that "percentage of error-free seconds" is the traditional measure of data errors used in LEC tariffs, but that the conversion to bit error rate provides a measure that is more accurate and more compatible with other computer industry benchmarks.[41] ICA states that the traditional 99.5

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34 USTA Comments at 17-18; see also SWB Comments at 25. USTA asserts that the Commission should defer the proposed requirement until final industry standards are adopted.

35 USTA Comments at 17-18.

36 Centel Comments at 3.

37 Pactel Comments at 14. Accord Bell Atlantic Comments at 2-3. Bell Atlantic asserts that this data can be collected only by manually counting trouble tickets or joint testing.

38 SWB Comments at 25.

39 D.C. PSC Comments at 18.

40 IDCMA also recommends service quality reports for analog data transmission, including loss deviation, attenuation distortion, envelope delay distortion, and impulse noise. IDCMA Comments at 7-8, citing Bellcore TR-NPL-000335.

41 ICA Comments at 4. IDCMA supports gathering data on data transmission service quality because voice grade criteria are not always relevant to data

percent measure, which translates to a bit error rate of 10^{-5}, is obsolete, since modern technology and fiber optics allow for bit error rates of 10^{-9} and lower.[42] ICA contends that availability, number of trouble reports, and repair intervals are the most important measures for data transmission purposes, and that availability can be measured indirectly through detailed bit error rate reporting.[43] ICA suggests that data transmission reporting include a time-of-day breakdown of availability, for example business day and 24-hour day.[44]

Boeing states that it engages in testing before accepting new circuits to determine whether thay are of the desired quality, but that private lines can and do deteriorate in quality. Boeing also argues that requiring standards of all LECs will assure that the level of quality on circuits remains the same as when they were originally purchased.[45] Boeing suggests that two standards be required in LEC interstate access tariffs: availability and bit error rate. Boeing Comments at 6. Boeing defines availability as the percentage of time that a full-period private line is available for use by a subscriber.[46] Bit error rate is a complementary and much finer measure of transmission quality, which measures the quality of transmission over the line; specifically, bit error rate is a measure of the number of bits transiting a digital private line that are errored (i.e., incorrectly transmitted) during a given period of time.[47] Boeing argues that availability

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transmission. In addition to quarterly reports, IDCMA recommends requiring a much more detailed report on a less frequent basis. IDCMA recommends basing this report on one of two network studies performed by Bell Labs. IDCMA asserts that computing cumulative distribution function is not appreciably more difficult than averages. IDCMA recognizes that these tests are costly, but believes the benefits outweigh the costs. IDCMA Comments at 1-4, 6-7.

42 ICA argues that the lower error rates are essential for modern data processing applications. ICA Comments at 4-5. Accord Boeing Comments at 8-9.

43 ICA Comments at 5. ICA also suggests that availability should be measured circuit-by-circuit as well as overall for the network, but acknowledges that such reporting may not be possible.

44 ICA Comments at 5.

45 Boeing Comments at 5.

46 Although stated in terms of a percentage, availability is a binary measurement, in that it measures whether a line is "up" and available for use, or "down" and incapable of transmitting information.

47 Bit error rate is stated as a negative exponent. Taken together,

and bit error rate measurements are, alone, not sufficient to prevent deterioration of service quality. Accordingly, Boeing urges that the standards included in LEC tariffs be "realistic," meaning that they "accurately reflect the performance which is readily achievable using today's technology."[48]

As noted in the Order at paras. 12-13, we have included in Table I of the quarterly reports a further breakdown of data in the repair interval report, to include high-speed data lines in the special access category. Although we considered the inclusion of actual measurements of transmission quality for high speed data, especially in view of the arguments of the parties cited above, we are persuaded, as we stated there, that the inclusion of high speed data transmission in the repair interval report is a better approach.

II. INFRASTRUCTURE REPORTS

Table I - Switching Equipment

In the March 8 Public Notice, the Bureau proposes to collect data on the total number of switching entities, and defines switching entities as "assemblies of equipment designed to establish connections between lines and trunks. Switching entities include local, class 5 switching machines and any associated remotes."[49] We have determined that expansion of the switching entity report is necessary. Services to customers depend on the location of certain types of equipment in the network as discussed herein; for example, placement of SS7 capabilities in tandems results in a different type of network enhancement than does placement of that technology in a local switch. Further, digital remote switching is becoming more important as fiber is deployed in the loop. To obtain a thorough picture of newer technologies as they are deployed throughout the network requires a comprehensive record. We discuss specific reporting expansions below.

The March 8 Public Notice requests comments on a separate category in the switching equipment table to allow for isolating data pertaining to remotes, which are presently included from the "total switching entities" count. See Order at paras. 27-28. Several parties support a separate breakout for remotes.[50] Hawaii and New York assert that the report should

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availability and bit error rate provide an accurate measure of the quality of digital private lines. Boeing Comments at 6-7.

48 Boeing Comments at 8.

49 March 8 Public Notice, Infrastructure Table I, n. 2.

50 Hawaii Comments at 7; New York Comments at Attachment; D.C. PSC at

also record the percentage of host switches with remotes and the average number of remotes to host, since this information is relevant to system architecture development.[51] The LECs counter that separate reporting is unnecessary.[52]

Remotes may sometimes serve the same purposes as the local switch, while sometimes they serve only a "relay" function. It is precisely because of their increasing sophistication and their wide use that we believe we should collect data to make us aware of their deployment in the network. In order to minimize the burden of this data requirement, however, we will limit our reporting of remote switches to those with "stand alone" capability. It is these remotes -- remotes which, when disconnected from the host switch, can continue to process calls within their local area -- whose number and deployment are essential to our monitoring of the infrastructure. We have accordingly included remote switches (with this restrictive definition) in our infrastructure report on switching equipment. Tandem switches are similarly included in this report. See Order at para. 29. The March 8 Public Notice also proposes to collect data on the total number of lines in service.[53] USTA proposes removing "etc." from the definition.[54] We agree, and have modified the table accordingly.[55]

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18 (claiming that the data is compiled monthly by Bellcore).

51 Hawaii Comments at 6-7; New York Comments at Attachment. Hawaii adds that remotes should also be reported separately in the Total Switch Downtime Report (Quarterly Service Quality Report IV) since remote outages may be caused by problems with either the host or the remote unit. United urges exclusion of reporting switch downtime in instances when a remote office is isolated due to a cable cut, but goes into the Emergency Stand Alone mode of operation. United Comments at 8.

52 See BellSouth Comments at 16-17; SWB Comments at 14; BellSouth Reply at 16; USTA Reply at 15. Pactel supports counting remotes as part of the last switching entity. Pactel Comments at 15. BellSouth suggests that switching entities be more specifically defined as hosts plus remotes, and that the Commission use the same definition in its service quality reports. BellSouth Comments at 16-17.

53 The table defines lines in service as access lines that include all classifications of local exchange telephone service, including individual lines, party line access, PBX access, Centrex access, Coin access, Foreign Exchange access, WATS access, etc. March 8 Public Notice, Infrastructure Table I, n. 3.

54 USTA Comments, Attachment at 4.

55 MSA/non-MSA data requirements are also removed from the access line

The March 8 Public Notice proposes to collect information on SS7 deployment in the LEC network.[56] Signaling System 7 (SS7) is a new technology that enables LECs to carry signaling information over a channel separate from the voice or data channel, thereby reducing call set-up time. Several LECs contended on reconsideration that the introduction of SS7 would further complicate measurement of LEC call set-up time measurement.[57] Those arguments, however, were predicated on the Commission's intention to measure LEC call set-up time using the sampling techniques exemplified by Bellcore's D-ASPEN,[58] and are thus not applicable to our current discussion of indirect calculation methodologies.

Some commenters suggest that the data collection on SS7 becomes complete and usable only if it includes information on the interLATA and intraLATA capabilities of SS7 deployment.[59] BellSouth supports local and tandem reporting of SS7 as the Bureau proposes, and suggests that deployment of SS7 intranetwork and internetwork capabilities be reported as well.[60] AT&T's

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reporting requirements, since such data would be difficult to provide, and is not essential (or, therefore, justified).

56 The report proposes to collect data on LECs' local and tandem switches equipped with SS7, including remotes; including both 1AESS and Digital Stored Program Control switching entities equipped with SS7. The corresponding number of access lines served by those switches is shown as access lines with access to SS7. March 8 Public Notice, Infrastructure Table I, n. 6.

57 Contel Petition at 5; SWB Petition at 7.

58 D-ASPEN is Bellcore's Digital Automatic System for Performance Evaluation of the Network. It is a sampling and testing procedure that was used by Bellcore in a one-time study to record post-dial delay using various types of switches and various routing combinations.

59 InterLATA, or internetwork, SS7 is defined in Bell Technical Reference TR-394. IntraLATA, or intranetwork, SS7 is defined in TR-317. For ease of reference we will call internetwork SS7 "SS7-394," and intranetwork SS7 "SS7-317."

60 BellSouth Comments at 17-18; BellSouth Reply at 16 (stating that intranetwork capability (SS7-317) is used by exchange carriers to provide enhanced signaling capability in the exchange carrier network, and internetwork capability (SS7-394) is used to provide SS7 interconnection with interexchange carriers).

proposal is similar to BellSouth's, but includes categories to show SSP (Service Switching Point, the LEC database query) provision.[61] MCI suggests reporting the number of signal transfer points (STPs, packet switches that switch the out-of-band signals) and signal control points (SCPs, which contain the databases that tell the network how to handle calls) within each LEC study area to account more fully for the level of investment.[62]

BellSouth suggests that infrastructure reporting of SS7 deployment can be used to develop a "simple and relevant" indicator of LEC performance. BellSouth states that the higher the penetration rate of SS7-394, the better will be the LEC call set-up time performance of the LEC, and if SS7-394 is fully deployed, no known technology can improve on the LEC call set-up time performance.[63] Others agree. In order to effect a LEC call set-up time calculation methodology USTA and SWB propose expansion of our infrastructure reports to include two fundamental infrastructure trends: switch deployment and replacement, and SS7-394 deployment.[64] USTA and SWB suggest that the data be collected annually as an infrastructure report, since it reflects switch and SS7 deployment.[65] AT&T maintains that basing LEC call set-up time

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61 AT&T Comments at 4-5. But see BellSouth Reply at 13 (contending that the reporting of SSPs would add information about the deployment of a certain generic issued for 800 database services -- helpful to AT&T, but irrelevant to our monitoring -- and that it would provide no further information about other services LECs might offer).

62 MCI Comments at 4.

63 BellSouth Reply at 13. BellSouth adds it does not support any requirements to make subsidiary calculations from the SS7 deployment data, since those calculations would merely be cosmetic and would add nothing to the Commission's understanding of LEC call set-up time not already provided by SS7 penetration data. BellSouth Reply at 14.

64 USTA Reply at 6-7, Attachment A; SWB Reply at 23-24, Attachment. Accord Bell Atlantic Reply at 3-4; MCI Comments at 4-5; AT&T Comments at 14. USTA states that theoretical LEC call set-up time can be calculated from existing studies using measurements of test calls in a multi-frequency signaling environment and theoretical calculations in an SS7-394 signaling environment, and that relying on ongoing measurements of infrastructure development would be less costly to monitor.

65 USTA Reply at 7 & Attachment A; SWB Reply at 24 & Attachment; see also Pactel Reply at 14-15; SNET Reply at 4-5; NYNEX Reply at 3-4 (offering to file its analysis of switch types in the NYNEX region each year). USTA's Attachment A and SWB's Attachment, titled "Infrastructure Report, Table IV, LEC Call Set-up Time," are identical. Switching entities, access lines, direct call set-up time, and tandem call set-up times for digital, analog and

reporting on calculations derived from infrastructure reports would be effective, except that the reports do not track SSPs or SS7-394, and are filed only annually.[66]

SS7 data is central to our calculation of LEC call set-up time, as discussed above. The Bureau believes that the inclusion of SS7-394 and SS7-317 data, but not SSP, STP, or SCP data, strikes a sound balance between sufficient reporting and burdensome reporting; the infrastructure table has been modified to reflect this determination. Finally, commenters in this proceeding propose different levels and categories of reporting LEC call set-up time. ICA argues that LEC call set-up time should be reported to the Commission in order to create trending analyses.[67] D.C. PSC and Allnet urge expansion of the LEC call set-up time report.[68] MCI urges disaggregation into busy hour and non-busy hour results, and by type of service.[69] We believe that the reporting requirements we have established provide sufficient insight into LEC call set-up time under varying situations in the network. We will monitor these filings carefully to assure that they provide adequate and accurate information about LEC performance.

ISDN reporting is discussed in the Order at para. 31.

Table II - Transmission Facilities

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electromechanical switches are to be calculated for those categories with SS7-394 and without SS7-394.

66 AT&T Comments at 2-4.

67 ICA Comments at 8 (post-dial delay is a recurring problem; it is important in the Commission's considerations of adjunct devices and 800 service database proceedings). Accord Allnet Reply at 4.

68 D.C. PSC Comments at 15-17, Exhibit 8; Allnet Reply at 4 (include data on end offices and tandems by SS7, multi-frequency and mixed signaling types).

69 MCI Comments at 3. MCI suggests further that data be disaggregated into end offices equipped with either call set-up or 800 database query functionalities, and end offices with both, in order to verify post-dial delay in the SS7 call set-up environment. See also Allnet Reply at 3-4. AT&T recommends gathering quarterly SS7 deployment data in addition to collecting SS7 data in the annual infrastructure reports. AT&T Comments at 4-5. MCI asks that the reports not be limited to LECs subject to mandatory price cap regulation. MCI Comments at 4-5. SNET opposes MCI's suggestion, stating that further reporting requirements would discourage other small or mid-sized LECs considering price cap regulation. SNET Reply at 5-6.

Infrastructure Table II collects data on LEC transmission facilities. Some parties propose modifications to the "Total Sheath Miles" and "Interoffice Working Facilities" categories.[70] Parties also propose modifications of our definitions of circuit links and carrier links.[71] In continuing discussions with USTA and other parties, we have refined the definitions of circuit links and carrier links (carrier technology segments) to their current form.[72] We believe these modifications offer greater clarity

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70 New York suggests that Interoffice Facilities should be disaggregated into working and equipped channels, as are loop channels. New York Comments at Attachment. MCI proposes that total sheath miles and total working facilities of inter-STP and inter-SCP links (carrier and circuit) be included. MCI Comments at 4. Other parties recommend inclusion of planned additions to each types of facilities for its upcoming year, including counts of open wire and total pair miles, and distinguishing between facilities in service (not under construction and not retired) from working facilities (producing revenue). New York Comments at Attachment; D.C. PSC Comments at 19-20. These additions are opposed by other parties, who claim that such reporting is duplicative and meaningless. See, e.g., USTA Reply at 16; SWB Reply at 19.

71 USTA and SWB propose that "a circuit link is defined as that link that exists between any two points A and B where voice frequency/DS0 cross-connects occur or where either or both points A and B are the respective serving wire centers," and that "a carrier link will be counted as a separate link on its respective transport medium (i.e., fiber, copper, radio) for each analog group or equivalent 1.544 Mbps assignment associated with that transport medium." USTA Reply at 17; SWB Reply at 21.

72 March 8 Public Notice, Infrastructure Table II, nn. 4 & 5. The March 8 Public Notice defines Circuit Links as "those individual segments of the network that an individual circuit rides on. In the case of a circuit routed through offices A-B-Z, where the segment from A-B is baseband and the segment from B-Z is analog carrier, each segment is a circuit link." This definition is modified to read: A circuit link is that link that exists between points A and B where voice frequency/DS0 corss-connects and/or analog/digital conversion (collectively referenced here as conversion) occurs.

The March 8 Public Notice defines Carrier Links as "those assignable segments of the interoffice network on which 4 kHz bandwidth (single voice channel) signals are multiplexed. All carrier links are counted on this 4 kHz basis for purposes of this report." The definition is modified to refer with greater clarity to Carrier Technology Segments, and to read: A carrier technology segment is defined as a segment of the interoffice network disaggregated by technology (i.e., analog, digital) and by medium (i.e., copper, fiber, radio). Each segment between central offices or other interoffice network nodes is defined as a unique carrier technology segment. For these purposes, a central office is an interoffice network node. Other

and specificity, and provide for more accurate measurement of likely changes in LEC network development. Other proposed modifications have also been incorporated to the extent that they offer clarification. See Attachment C. Some parties suggest changes to the "Local Loop" portion of the report.[73] We have made only minor changes; see Attachment C.[74]

The March 8 Public Notice proposes to collect data on pairs terminated at the main frame and fiber to customers; [75] see Order at para. 34. Some parties assert that those definitions should be clarified;[76] some comments

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interoffice network nodes are defined as any point in the interoffice network where a cross-connect occurs, or where a change in technology or medium occurs. Counts are on an analog group of DS1-equivalent basis.

73 D.C. PSC supports inclusion of local loop used to provide ISDN and related ISDN circuits. D.C. PSC Comments at 20-21. D.C. PSC suggests that "Total Working Channels" and "Total Equipped Channels" include counts of local loop facilities used to provide high capacity services. BellSouth questions whether the fiber digital carriers are defined as systems that are completely fed by fiber end to end with no copper in the feeder portion. BellSouth Comments at 19. The "Local Loop" portion of the report deals with terminations at the local switching office. A termination will be counted as a fiber termination if it is fiber at the point it connects with the central office. AT&T recommends including data on digital loops and wireless loops. AT&T Comments at 5-6.

74 We believe that LEC provision of high capacity services is sufficiently tracked in the fiber deployment records of this report, and that requesting the additional information would not be justified by the insight it would provide into the character of the network.

75 Table II, nn. 9-11. It proposes to collect fiber strands in central offices (number of individual fiber strands in central offices, n. 9), fiber to buildings (number of buildings equipped by fiber from central office, n. 10), and fiber to customers (number of individual fiber strands to customers other than on fiber trials, n. 11).

76 See SWB Comments at 18-19; Pactel Comments at 17; D.C. PSC Comments at 21; SWB Reply at 21-22. BellSouth suggests amending the definition of "fiber to buildings" to "the number of fiber strands terminating on a customer premises, including IXCs, where the electrical interface is DS1 or high speed services," and the definition of "fiber to customers" to "number of fiber strands transporting services where the electrical interface is less than DS1 speed services, including fiber to the curb and fiber to the home other than for trials." BellSouth Comments at 19. BellSouth argues that its wording would better measure fiber loop deployment and would permit the reporting of fiber contained in new network architectures. BellSouth Comments at 19. See

propose other definitions of fiber to customers.[77] As noted in the Order, our report shows terminations to customer premises at various data speeds.

Some parties request other enhancements to various reporting requirements.[78] Other parties support the table as proposed.[79] We are confident that the current reporting requirements successfully achieve the Commission's desired balance between the usefulness of the data and the burden of providing it. On major incentive for LECs to upgrade the network, including the local loop, is to reduce cost and improve efficiency. In light of that incentive, we believe it would be premature to require more detailed reporting than is set forth here.

Table III - Additions and Book Costs

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also SWB Reply at 22 (asserting fiber DS1 and DS3 deployment should be the focus for the local loop, and DS0 deployment should be the focus of fiber to the curb and fiber to the home).

77 NYNEX suggests that fiber to customers would be measured more meaningfully by measuring the number of miles of fiber strands in the local loop, including the feeder and distribution area, but excluding interoffice fiber. NYNEX Comments at 7. Bell Atlantic states that since fiber can serve many customers on a single strand, the Commission should instead require reports of the numbers of operating circuits (excluding trials) provided to customers over fiber facilities, divided into two categories: "High capacity circuits (DS1 and above)", and "DS0 circuits" (which would include fiber to the curb and fiber to the home applications). Bell Atlantic Reply at 2 n.6.

78 See D.C. PSC Comments at 21 (intrabuilding copper pairs and intrabuilding fiber strands should be explicitly included or excluded from the "Copper Pairs Terminated at Mainframe" and fiber counts); SWB Reply at 21-22 (asserting that fiber deployment information provided in the local loop, working channels and equipped channels counts focuses only on digital loop carrier systems); SWB Comments at 17-18 (recommending data collection on the bandwidth equivalency of fiber leaving central offices, so that the data will be more easily compared with copper data). We are interested in copper pairs terminating at the mainframe going into the local loop, so we will not adopt D.C. PSC's suggestion. Regarding SWB's proposal, we mean to count strands, not capacity, so we will not require a voice grade equivalent measure.

79 See Florida Comments at 5 (stating that its Schedule 21 requires similar transmission data annually, including related budget information for that year); BellSouth Comments at 19 (stating that it can report prospectively the Total Sheath Miles, Interoffice Working Facilities and Local Loop data requested).

Responding to a challenge by D.C. PSC, SWB states that the definitions proposed in the March 8 Public Notice are appropriate definitions for measuring infrastructure development, as a commitment of capital investment and maintenance effort by the LEC is required for all access lines, whether or not they are revenue-producing.[80] SWB and USTA suggest that access lines be reported on an end-of-year basis. They suggest that the time clarification would ensure consistency with industry-accepted methods for reporting lines and gains.[81] New York suggests that Total Gross Capital Construction be reported by account.[82] Pactel argues that the report should be eliminated altogether, since it duplicates information collected in the ARMIS 43-02 and Form M reports. Pactel Comments at 17-18.

We will not limit our monitoring of access lines to just those that are revenue-producing. Our purpose in requiring these infrastructure reports is to create a comprehensive understanding of network development and LEC investment. We agree with SWB that all access lines require capital investment and maintenance by the LEC; we believe that a full perspective on the network requires the reporting we have outlined.

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80 SWB Reply at 20. D.C. PSC argued that "Access Lines in Service" should be limited to revenue-producing access lines. D.C. PSC Comments at 21-22. USTA states that D.C. PSC's alterations of the definitions of "in service" and "working" access lines are not standard and should not be used. USTA Reply at 16. Accord SWB Reply at 20. New York recommends disaggregating access lines in service and gain data into services as defined in Table 1, n. 3. New York Comments at Attachment.

81 SWB Reply at 22; USTA Reply at 17 (measure access lines as of December 31 of the reporting year, and access gain from December 31 of the prior year to December 31 of the reporting year).

82 New York Comments at Attachment.

IV. OTHER REPORTING ISSUES

A. Disaggregation of Reporting

1. MSA/non-MSA Disaggregation

In the March 8 Public Notice we proposed to disaggregate some data by distinguishing between Metropolitan Statistical Areas (MSAs) and non-MSAs.[83] The LECs generally argue against the expansion of disaggregation in reporting requirements, and in some cases argue against any disaggregation of reports to MSA and non-MSA data. USTA disputes the need for this disaggregation, stating that the Bureau proposal goes far beyond anything the Commission contemplated, and that the MSA/non-MSA distinction is simply not relevant to the provision of service.[84] The LECs state that they provide the same level of service to rural and urban areas.[85] United argues that the Bureau has not shown the value of disaggregated data.[86] Centel also asserts that this breakdown serves no purpose, since Centel, like other LECs, does not distinguish between its urban and rural customers in the provision of service.[87] SNET says that it does not believe the MSA/non-MSA disaggregation is necessary, since it does not apply different standards for urban and rural areas, but concedes that this disaggregation is the most reasonable means to track potential discrepancies.[88]

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83 March 8 Public Notice, passim. We proposed to report MSA/non-MSA for local service trouble reports, switch downtime, service quality complaints, and switching equipment, but also asked generally whether we should use this distinction in other reports, and whether we should disaggregate still further, perhaps using the Commerce Department's four levels of MSA.

84 USTA Comments at 9; USTA Reply at 9-10; Accord GTOC Comments at 2-3; NYNEX Comments at 4-5; United Comments at 5-6; United Reply at 2.

85 GTOC Comments at 2; NYNEX Comments at 5; United Comments at 6.

86 United Comments at 5.

87 Centel Comments at 2-3; Centel Reply at 4; see also Pactel Comments at 3 (alleging that MSA/non-MSA reporting may not provide the Bureau with information on rural and urban areas). But see TCA Reply at 10-11 (asserting that their policy is irrelevant; the critical issue is whether actual performace varies by location).

88 SNET Comments at 4.

Some parties urge the elimination of MSA/non-MSA reporting for all tables except Tables V (complaints) and IV (switch downtime).[89] Centel objects to the breakdown of switching equipment into MSA and non-MSA data, stating that this is a breakdown not currently being used by Centel.[90] Bell Atlantic asserts that such reporting would be more costly than its usefulness justifies.[91]

BellSouth asserts that the study area is its most significant geographic unit of managerial responsibility, and argues that data submitted on a study area basis is sufficient.[92] United asserts that service quality data is most useful when aggregated, stating that if a LEC lowers its standards in rural service areas, the deterioration would be detected in aggregate service quality reports.[93] GTOC argues that disaggregated reporting is unnecessary, and that the burdens of collection outweigh the benefits provided by disaggregated data. SWB supports disaggregating some data on an MSA/non-MSA basis, but claims that it may not be able to provide this data by July 1.[94] LECs argue that the Bureau, if it does retain MSA/non-MSA distinctions, should not require such filing for 1990 data, but only for data on 1991 and later, when price cap regulation is in effect.[95] These parties also object that even for Tables IV and V, it would be unduly burdensome to break down the

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89 USTA Comments at 9-10; Bell Atlantic Comments at 1-2 (stating that it does not track information by MSA/non-MSA, and that it would have to redesign its information systems to track this); NYNEX Comments at 4-5 (asserting that the Commission specifically rejected detailed, geographically disaggregated reporting requirements); BellSouth Reply at 5 (suggesting that MSA/non-MSA distinctions even for Table IV be restricted); SNET Reply at 6.

90 Centel Comments at 2. Accord GTOC Comments at 2-3; United Comments at 6.

91 Bell Atlantic Reply at 2. Accord GTOC Comments at 2-3 (arguing that this is especially true if the data were required by the 4 levels of MSAs proposed in footnote 3 of the March 8 Public Notice.

92 BellSouth Comments at 3-5.

93 United Comments at 6.

94 SWB Comments at 12. Accord Pactel Comments at 3-4; Pactel Reply at 6.

95 Pactel Reply at 6. Since MSAs will be redefined in 1992, Pactel recommends postponing this requirement until that time. Accord NYNEX Reply at 4.

information by different sizes of MSAs, as is suggested at note 3 of the March 8 Public Notice.[96] SWB opposes disaggregating any data by size of MSA, concluding that this would add little to the Bureau's ability to monitor service quality in rural areas.[97] BellSouth opposes any proposal to disaggregate certain items on the basis of the size of the MSA, and any other proposal that would require disaggregation of data at any level below that of MSA/non-MSA, since provision of that data would be cost prohibitive and would provide LEC competitors with valuable proprietary information.[98]

Several LECs urge elimination of the MSA/non-MSA disaggregation requirement as applied to access lines.[99] These parties argue that the costs imposed by the proposed disaggregation of access lines by MSA/non-MSA would be a costly, ongoing administrative procedure and would provide little meaningful information.[100] BellSouth asks that the Commission remove the MSA/non-MSA distinction or alternatively, remove the column labeled "Number of Access Lines."[101]

GTOC suggests that investigations of service complaints by rural end users would be less costly than collection of data by MSA.[102] NYNEX states that it would not be unduly burdensome to disaggregate federal complaint and switch downtime data by MSA/non-MSA, but argues that provision of data at that level for state complaints and trouble reports would increase NYNEX's costs without providing meaningful information.[103] BellSouth opposes MSA/non-MSA transmission quality reporting, since one end of a circuit might be in an MSA and the other not. BellSouth asserts that digital transmission quality is a

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96 USTA Comments at 10; Bell Atlantic Comments at 2 n.4 (asserting that this information would not provide any useful information on service quality in rural areas).

97 SWB Comments at 13.

98 BellSouth Comments at 5, 15.

99 SEE, e.g., NYNEX Comments at 5; BellSouth Comments at 4; BellSouth Reply at 5.

100 See also Pactel Reply at 5-6.

101 BellSouth Comments at 4-5.

102 GTOC Comments at 3.

103 NYNEX Comments at 5.

large customer issue, not a rural/urban issue, and further cautions that the information requested cannot be accurately constructed retroactively.[104]

States and user groups, on the other hand, support the disaggregation of data to MSA and non-MSA, and in some cases suggest still further disaggregation, such as to the four levels of MSAs mentioned in the Public Notice.[105] Hawaii supports MSA/non-MSA disaggregation, stating that users' incentives and opportunities to utilize alternatives to LEC access provision differ across geographic areas. Hawaii argues that absent competition, LEC responsiveness in terms of time and technical availability will diminish.[106] MCI contends that this disaggregation is useful in measuring service quality and infrastructure development in rural versus urban areas, and notes that none of the LECs who say this data is useless has explained or supported this argument.[107] TCA suggests that LECs be required to disclose on an exception basis those wire centers that do not meet the LECs' internal standards.[108] Hawaii argues that the complaint report (Table 5) fails to differentiate between small and large businesses, and does not include complaints filed with the LECs themselves, which, Hawaii argues, includes the vast majority of customer complaints.[109]

These parties also dispute LEC assertions of cost and burden in MSA/non-MSA reporting.[110] TCA asserts that many state commissions require reporting at least this disaggregated, and that assigning a wire center to a class of MSA or to non-MSA would be far from burdensome.[111] Further, TCA argues, any costs or burdens are fully justified by the need for this data, since "there are simply too many ways that the LECs could cut costs in a manner that disproportionately affects less urban areas."

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104 BellSouth Comments at 13-16.

105 See, e.g., TCA Reply at 7-9.

106 Hawaii Comments at 4.

107 MCI Reply at 7.

108 TCA Comments at 13; TCA Reply at 7-8.

109 Hawaii Comments at 6.

110 See, e.g., MCI Reply at 7 (stating that a simple low-cost mapping of the zip code or county of the switch location, and a cross-tabulation of this information with the report data, allows this reporting).

111 TCA Reply at 9-10.

As noted in the Order, at para. 39, we will retain the geographic disaggregation of service quality data that was proposed in our March 8 Public Notice. We believe that this requirement will not be unduly burdensome for LECs, and that the benefit of collecting this data outweighs the burden imposed. In view of LEC statements that they will need extra time to develop this disaggregated reporting, we will require MSA/non-MSA reporting as of June 30, 1991, only for federal complaints; the MSA/non-MSA distinction need not be shown on the other three reports until entry of these reports into ARMIS in August 1991. We note that if our monitoring and analysis indicate that undesirable developments are occurring, or that more detailed reporting is called for, we will revisit this issue.

2. Other Geographic Disaggregation

Michigan supports the NARUC resolution's suggestion that some reporting be done at the local wire center level and by NPA-NNX as opposed to at the study area level and with MSA/non-MSA distinctions.[112] Michigan also urges the inclusion of additional measurements, as proposed by NARUC.[113] Florida recommends that the Commission require that reports be provided on an exchange basis to preclude the averaging-away of poor service quality conditions in small rural exchanges.[114] Boeing and TCA suggest that LECs be required to report results for each wire center.[115] The LECs oppose this "microscopic" reporting, stating that it would be extremely expensive and cumbersome, and

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112 Michigan Comments at 2. Michigan asserts that the more aggregated reporting included in the March 8 Public Notice would mask service deficiencies, especially in small rural offices, and that the more detailed reporting would allow for the correlation of this data with census bureau and statistical data at the county level. Accord Allnet Reply at 4; NARUC Comments at 7.

113 Michigan Comments at 3-4; NARUC Comments at 5-6 (suggesting inclusion of specific local loop, switching, and rate information, inter alia).

114 Florida Comments at 1-2, 6. It cites, as an example, that if an exchange such as Cedar Key (which has 700 lines) were to be included in a service center with Miami (which has almost a million access lines), the Cedar Key exchange could be entirely out of service but would affect the overall rate by only a small fraction of a percentage point. See also Hawaii Comments at 3-4; Hawaii Reply at 1-2 (urging reporting on 4 levels of MSA and separation of small and large businesses).

115 Boeing Comments at 13; TCA Comments at 9-10. TCA suggests that reporting be performed on an exception basis in addition to providing overall results regarding percentage of compliance with LECs' service quality standards.

asserting that no party has shown any need or justification for it.[116] As discussed in the Order at para. 39, we will not require this level of detail in the monitoring plan.

3. Service Disaggregation

SNET objects to the disaggregation of data by both switch size and MSA/non-MSA, stating that switch size does not indicate a rural/urban distinction and is therefore unnecessary.[117] NYNEX and BellSouth oppose any more detailed service breakout, including the categorization used in the BOC ONA Reconsideration Order and mentioned in March 8 Public Notice.[118] BellSouth supports reporting by switched and special access categories, and notes that all price cap LECs are capable of reporting at this level of detail.[119]

Other parties urge further disaggregation of services in accordance with the categories in the BOC ONA Reconsideration Order. TCA asserts that disaggregation beyond the access category level is essential in order to deter migration of customers among same-category services.[120] Boeing asserts that reporting at the level required in the BOC ONA Reconsideration Order should not impose substantial burdens on the carriers.[121]

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116 See, e.g., Bell Atlantic Reply at 1; BellSouth Reply at 8, 11; Pactel Reply at 4-6. USTA urges that, with 43,000 NXXs in the United States, the time and expense required to report such data, and the time and expense required of Commission staff to review it, surely outweigh any perceived benefit in having that level of detail. USTA Reply at 10.

117 SNET Comments at 7-8.

118 NYNEX Comments at 7-8; BellSouth Comments at 5-7. Accord USTA Reply at 9 (noting that the requirement would be duplicative for BOCs and onerous for non-BOCs). BellSouth argues that the ONA reports would not be readily transferable to the filing requirements here. BellSouth Comments at 5-6.

119 BellSouth Comments at 6-7 (noting that management is evaluated according to the categories in the Commission's original proposal.

120 TCA Comments at 10-11 (stating that migration between voice grade and high capacity special access services caused by LECs' strategic pricing has previously been a problem for TCA members, and that selective manipulation of service quality is simply another effective means for a LEC to reach the same strategic end). See also TCA Comments at 7; TCA Comments at 10; TCA Reply at 11-13.

121 Boeing Comments at 13-14 (BOCs already collect information for their ONA non-discrimination reports which is similar to that required in the proposed

As in the case of requests for further geographic disaggregation, we are not convinced that increasing the level of reporting detail is either necessary or desirable. We have modified reporting requirements here in ways that will capture some urban/rural distinctions, and we are collecting very detailed information on network investment in our infrastructure reports. If any of our monitoring persuades us that further detail is necessary, we will revisit this issue, but we do not find any present justification for expanding our reporting requirements in this way.

B. Standards

1. Standards in Interstate Tariffs

Some parties favor disclosure of service standards, particularly standards for data transmission quality, in the LECs' interstate access tariffs.[122] Boeing specifies that LECs should be required to include availability and bit error rate standards in their interstate access tariffs for digital private lines.[123] TCA argues that the LECs' internal standards should be disclosed wherever a report relies on those standards.[124]

Boeing and TCA argue for a Bureau requirement that the LECs publish their internal service quality standards in their federal tariffs.[125] D.C. PSC urges the Bureau to standardize the collection of data further.[126] TCA

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installation and repair interval reports). Accord TCA Comments at 11.

122 TCA Comments at 5-8; Boeing Comments at 2-6; ADAPSO Reply at 1-3; Boeing Reply at 3-6; Information Industry Association (IIA) ex parte letter of May 13, 1991; TCA Reply at 3 (LECs should file standards for every service category in Attachment D [from the BOC ONA Reconsideration Order]).

123 Boeing Petition at 6-10; accord ADAPSO Reply at 1-3.

124 TCA Comments at 5-8 (requiring the LECs to report information that is not based on published standards permits the carriers to manipulate the monitoring reports, and prevents meaningful comparisons between LECs).

125 Boeing Comments at 3-4; TCA Comments at 5-7 (require that LECs certify that the tariffed standards are no lower than those in effect as of January 1, 1991, or to justify the decreases; afford users an opportunity to question standards that appear low in light of improving technology). See also TCA Reply at 3 (standards would give meaning to the current "pass/fail" system the LECs use in reporting; standards would help users plan their networks).

126 D.C. PSC Comments at 2 (LECs should certify in their tariffs that they will conform to voice and data quality standards developed by the American

argues that public disclosure of LEC standards would either satisfy users' concerns or convince LECs to promise improved performance.[127] ICA voices a fear that price cap regulation will encourage LECs to freeze service quality standards at old, inappropriate levels, thereby allowing them to charge premium rates for service quality that is in fact standard.[128] ADAPSO notes that no party has offered any sound reasons why standards should not be included in tariffs.[129] Boeing asserts that, in the absence of standards against which to measure the performance of the lines, it is difficult to require LECs to repair or replace the circuits.[130] As a concomitant to the inclusion of standards in tariffs, some of these parties assert, the Commission should develop new or expedited complaint processes.[131] Boeing suggests that the Commission establish regional forums for dispute resolution, as an immediate and intermediate step before complaints.[132]

Some of the LECs oppose the requirement to include service standards in interstate tariffs, stating that it would result in administrative overload with no appreciable benefit.[133] SNET states that, although it does include many performance standards within its tariffs, it opposes any requirement

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National Standards Institute (ANSI)).

127 TCA Comments at 7.

128 ICA Comments at 2-4 (old, analog network standards should become a "floor" for service quality; floor should rise with the introduction of new technologies).

129 ADAPSO Reply at 3; accord Boeing Reply at 6-9 (noting that only Pactel objects to such inclusion, and then only on the grounds that including standards in tariffs will likely result in increased litigation over terms and conditions). See also TCA Reply at 4.

130 Boeing Comments at 5 (although it engages in testing prior to accepting new circuits to determine whether they are of the desired quality, private lines can deteriorate).

131 Michigan Comments at 1; TCA Comments at 4 n.5.

132 Boeing Reply at 8, 17-19.

133 See, e.g., Pactel Reply at 7-8 (stating that standards change often, and each change would require a tariff revision filing, and that services are often tailored to individual customers.)

to do so.[134] USTA, too, argues that there is no need to require that standards be included in tariffs.[135]

As stated in the Order at para. 44, we will not at this time impose a requirement that LECs file service standards in their tariffs.

2. National Standards

TCA argues that the Bureau should take specific steps to promote uniformity among the LECs regarding the establishment of standards.[136] Pactel acknowledges the need for national standards, but urges that this be left to the T1Q1 Technical Subcommittee.[137] Boeing asserts that private sector forums are inadequate and should be required to report their progress to the Bureau periodically.[138]

Michigan urges the establishment of a new Joint Board for the purpose of recommending national uniform service quality standards.[139] Meanwhile,

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134 SNET Reply at 10. SNET emphasizes the burden, the cost, and the lag involved in such a requirement.

135 USTA Reply at 5.

136 TCA Comments at 5-7. TCA urges the Bureau to establish a forum for LECs and users to develop nationwide service quality standards, and to require that a Bureau staff member attend all the sessions and that periodic reports be submitted. TCA Comments at 7; TCA Reply at 5-6 (finding record support for such a development). See also Boeing Comments at 9-10 (suggesting that the Bureau direct LECs to work with users to develop realistic service quality standards, particularly in the area of data transmission quality). These groups would meet regularly, reporting periodically to the Bureau, and would serve as a complement and catalyst to the T1Q1 group currently working on standards development. Boeing Reply at 19.

137 Pactel Reply at 16. But see TCA Reply at 15 (it is unclear when or if T1Q1 will ever finalize standards).

138 Boeing Comments at 9-10 n.3; Boeing Reply at 17-18.

139 Michigan Comments at 1-2. The Joint Board should use the NARUC resolution, "Monitoring of the Effects of Interstate Price Caps for Local Exchange Carriers," adopted February 27, 1991, Michigan urges, and should develop uniform data reporting requirements, uniform service quality standards, and enforcement procedures and penalties. See also NARUC Comments at 4-6.

Michigan asserts, the Commission should require LECs to include their existing service quality standards in their interstate tariffs, to facilitate the development of national standards as well as to improve customer access and improve the complaint process. Hawaii states that it is necessary to verify and enforce LEC service quality standards.[140]

BellSouth counters that standards are not required.[141] BellSouth opposes the use of service standards in the monitoring of the LEC price cap plan, and suggests that industry forums and attention to customers' desires is more appropriate to determine service quality benchmarks.[142] Bell Atlantic notes that the Commission has already considered and rejected the establishment of national standards.[143]

With regard to the broader question of the development of national service quality standards, the Commission determined that there is no present need to develop national standards for service quality, and that question is therefore not before us. We dismiss the comments urging the Bureau to establish a standards entity, as they constitute a belated petition for reconsideration. With regard to the question of increasing uniformity in existing reporting, the Commission stated that this is our goal, and will be accomplished in an ongoing approach. We believe that our detailed definitions and requirements here, and the filing of all required data in the automated database system, ARMIS, will result in significant strides toward uniformity.

C. Small LECs

Rochester argues that Tier 2 price cap carriers have sufficient incentive under the price cap scheme to provide high quality service, and should thus be excused from detailed and burdensome reporting.[144] USTA reiterates its argument that smaller LECs (Tier 2 and below) should be exempt from service quality and infrastructure reporting requirements.[145] Rochester

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140 Hawaii Reply at 2-3.

141 BellSouth Comments at 3; accord USTA Reply at 5.

142 BellSouth Comments at 3.

143 Bell Atlantic Reply at 3; see also NYNEX Reply at 2-3; SWB Reply at 4-5; USTA Reply at 5.

144 Rochester Comments at 9.

145 USTA Comments at 5-7; see also Rochester Comments at 3, 6-9 (requirements would not substantially increase the amount of meaningful data available, but would place undue burdens on Tier 2 carriers considering election of price caps); United Comments at 3-5.

states that the proposed requirements would result in greater additional costs per access line for smaller than for larger carriers.[146] United and Rochester argue that the Commission has previously relieved smaller LECs of reporting requirements imposed on larger LECs, and urge that the Bureau again recognize the special circumstances of smaller LECs and exempt them from the proposed reporting requirements.[147] No party opposed these assertions.

While we appreciate the concerns of these price cap carriers that have small affiliates, the Bureau is not authorized to diverge from the Commission's determination that all price cap carriers will file the required quarterly reports. The Commission has expressed and affirmed its intention to examine these carriers' concerns in detail in a separate proceeding; in the meantime, all price cap carriers will be required, except as discussed here and absent a waiver, to file the mandated reports.

D. Exogenous Treatment of Reporting Costs

BellSouth asserts that all costs associated with the development, maintenance, and provision of service quality data should be considered exogenous cost adjustments to the price cap index. BellSouth states the historical productivity information used to set the LEC productivity offset did not include the costs associated with new service quality and infrastructure monitoring requirements.[148] Boeing opposes this argument,

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146 Rochester Comments at 7. See also United Comments at 3-4 (the National Telecommunications Information Agency (NTIA) estimates that for large LECs the direct cost of regulation is between $6 and $8 per access line annually, whereas for small LECs, compliance costs may range up to $45 per access line annually).

147 United Comments at 4-5; Rochester Comments at 7-8 (noting that the ARMIS quarterly financial reporting requirements and the Tariff Review Plan reporting requirements for annual access filings are less burdensome for Tier 2 than for Tier 1 carriers). Further, Rochester notes that some reporting requirements, such as installation and repair intervals and trunk blocking, would not be measurable by a secondary Tier 2 carrier that provides access to interexchange carriers indirectly through access tandem arrangements with other primary exchange carriers.

148 BellSouth Comments at 7; BellSouth Reply at 4-5. Accord SNET Reply at 1-3 (permitting exogenous cost adjustment for the reports would help ensure that LEC customers request only reports that would actually be needed).

stating that service quality reporting costs are endogenous.[149] MCI notes that if the LECs can manage to develop the needed reporting schemes for calculating PCIs, APIs, and SBIs to reap the benefits of price cap regulation, they can and should be made to develop the requisite service quality and infrastructure monitoring reporting as well.[150]

We reject BellSouth's proposal. The Commission allows exogenous treatment for costs that are outside the LECs' control and are imposed by an external, often regulatory, body. Service quality data collection is clearly within the parameters of operations that should and must be undertaken by each LEC in the course of its business and in its provision of service. Further, to the extent that the service quality monitoring program does impose costs, this imposition is balanced by substantial reductions in costs of preparation of other required filings, such as the annual access filing. The filing with this Commission of service quality and infrastructure data is a natural outgrowth of LEC operations and of the fact that LECs are regulated companies. Service quality and infrastructure reporting have been a stated and essential part of the LEC price cap plan from its inception.[151] The cost of such data collection and filing does not merit exogenous treatment.

E. Miscellaneous

Centel urges that the Commission use service quality data already available from carriers, state commissions, and interexchange carriers, and states that the slight differences in methodologies and measurements will not affect the usefulness of these data sources.[152] D.C. PSC recommends that the Bureau collect data from the the monthly blockage reports submitted by LECs to interexchange carriers, and from the Local Exchange Routing Guide (LERG) compilation of information on switches updated monthly by Bellcore, in

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149 Boeing Reply at 15 n.34. Accord MCI Reply at 2-3 n.4 (the service quality and infrastructure monitoring program is an inherent part of the LEC price cap plan, and its costs are thus endogenous).

150 MCI Reply at 8. Accord TCA Reply at 18-19 (it is the risk / reward system itself that creates the threat to service quality and infrastructure that in turn militates for this reporting and monitoring plan).

151 Second Further Notice, 4 FCC Rcd 2873 (1989); LEC Price Cap Order, 5 FCC Rcd 6786 (1990); LEC Price Cap Reconsideration Order, FCC 91-115, rel. Apr. 17, 1991.

152 Centel Comments at 5-6; Centel Reply at 2 (Commission could develop uniform format, and allow LECs to report data already collected for state commissions, plus data from consumer surveys and other sources).

addition to the reporting proposed in the Public Notice.[153] Although it appears, upon examination of the materials provided by D.C. PSC, that the monthly reports and the LERG contain detailed and useful information, such reconsideration of the Commission's determination is beyond our delegated authority and beyond the scope of this proceeding.

ICA asserts that the Commission should evaluate how the service quality data will be utilized, since, if trend analysis is the objective, the need for strictly comparable inter-carrier comparisons is limited.[154] ICA suggests that an indexing system be established, with current performance set at 100, to trace trends of deterioration or improvement, and that this index be responsive to changes in technology. ICA believes that deterioration should be penalized, and suggests a lowering of the LEC's PCI as a meaningful penalty. The Commission has stated its intention of developing service quality and infrastructure data collections that will be available to, and used by, state commissions, users, and other interested parties, as well as Commission staff. It has also stated that this data collection will focus on trends rather than absolutes.[155] Any further examination of the data's use is beyond the scope of this proceeding. Centel suggests that the Commission use the service quality and infrastructure data it is collecting to develop a "bonus" plan for companies that meet or exceed certain industry standards for customer satisfaction, service quality, and network modernization.[156] This proposal was submitted to, and rejected by, the Commission in the reconsideration proceeding,[157] and is thus dismissed.

ICA urges that the reports included in the ARMIS system be subject to the usual certification process, and therefor to the penalties under Section 220(e) of the Communications Act.[158] The certification process is an innate part of the ARMIS system, and is accordingly included in the view ARMIS reports.

Michigan argues that policies or procedures adopted as a result of the Bureau's proceeding should not pre-empt any state's authority to regulate

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153 D.C. PSC Comments at 3; D.C. PSC Ex parte of May 8, 1991.

154 ICA Comments at 7-11.

155 LEC Price Cap Order, 5 FCC Rcd at 6827, paras. 332-337.

156 Centel Comments at 7.

157 LEC Price Cap Reconsideration Order at para. 192.

158 ICA Comments at 6, citing Communications Daily report of BellSouth falsified reports, April 2, 1991. Accord MCI Reply at 9 n.21.

quality of service in the intrastate jurisdiction.[159] The Commission has made clear that its monitoring program will not preempt or interfere with any states regulatory authority or procedures.[160]

F. Timing and Procedural Matters

General questions regarding filings dates and requirements are addressed in the Order at paras. 46-47. Other, more specific questions and requests are addressed here.

Pactel requests an extension of time to complete Infrastructure Table II.[161] Pactel has made its request in only the most general terms, however, and has not shown good cause for an extension. If Pactel can demonstrate good cause why it should be excused from the June 30 filing date for its Infrastructure Report on transmission facilities, it should submit this showing in the context of a request for waiver.

Pactel also requests permission to file its "average interval of missed commitments" in Table I of the Quarterly Service Quality Reports using a measure of "average delay days," stating that it requires "several months...to develop the capability and to gather the data in the proposed format."[162] We will grant Pactel's request and allow Pactel to use "delay days" in this report for the June 30, 1991 filing only. Pactel must use a footnote to define exactly what it means by "delay days" and how they are calculated. Commencing with the September 30, 1991 filing, Pactel will use the standard measurement of "average interval."

Pactel requests permission to report total switch downtime as a count of reports to Pactel's emergency control centers rather than giving a total, cumulative count of downtime. Pactel does not state any undertaking to develop the reports detailed in the March 8 Public Notice, nor does it defend the usefulness or adequacy of its proposed alternative. Pactel has been on notice since fall 1990, through numerous Commission - industry discussions and exchanges, that reporting of cumulative switch downtime would be required; this factor was formalized in the Bureau's March 8 Public Notice. We find no good cause to grant Pactel further extension or the use of its proposed alternative in this regard.

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159 Michigan Comments at 4. Accord NARUC Comments at 10.

160 LEC Price Cap Order, 5 FCC Rcd at 6829, para. 350.

161 Pactel Comments at 16.

162 Pactel Comments at 5.

Attachment C
ARMIS Format Reporting Tables
Price Cap LEC Service Quality and Infrastructure Monitoring

Report 43-05	Quarterly Service Quality Report
Report 43-06	Semiannual Service Quality Report
Report 43-07	Annual Infrastructure Report

This document provides the instructions for FCC Report 43-05, the ARMIS Service Quality Report, which was adopted by the Commission in CC Docket No. 87-313. The instructions consist of the following sections, which are attached.

1. Reporting Procedures - details on the specific procedures to be followed when submitting this report to the Commission.

2. Report Definition - an illustration of the rows and columns to be reported and their definitions.

A. Introduction

This document contains details on the specific procedures to be followed when submitting FCC Report 43-05, the ARMIS Service Quality Report, to the Commission.

B. General Information

1. FCC Report 43-05 was adopted by the Commission in the LEC Price Cap Order, Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786, 6827-30 (1990). This report is prescribed for every local exchange carrier for whom price cap regulation is mandatory and for every local exchange carrier that elects to be covered by the price cap rules.

2. Affected carriers shall file by March 31, June 30, September 30 and December 31 of each year the report for the previous calendar quarter. The initial report will be filed in June 1991 and will contain data for the first quarter of calendar year 1991.

3. The report shall be filed on a study area (jurisdiction) basis.

4. Each report and diskette must be clearly labeled to include the report number, company, study area, period, COSA code, version and submission number. The report number is 43-05, which identifies the filing as the ARMIS Service Quality Report. The period identifies the year and quarter covered by the data. See the attached COSA Code Table (CO = Company, SA = Study Area) for a list of companies and their respective COSAs. The version refers to whether the filing is confidential, public or unrestricted. The submission number is defined as follows: Submission 0 is for test data purposes only. Submission 1 is the first submission of a quarter's data. Higher numbers (2, 3, etc.) would be used if needed for successive revisions to correct that quarter's submission.

5. All correspondence and pleadings shall identify the proceeding as CC Docket No. 87-313.

C. Where to file

1. Carriers submitting FCC Report 43-05 should consult the schedule below which details the number of copies required and the location to which those copies should be delivered.

2. Carriers are reminded that they must serve a copy of both the paper report and the automated report (diskette) on the FCC's contractor for public records duplication, Downtown Copy Center at 1114 21st. Street, N.W., Washington D.C. 20036 or delivered to Downtown Copy Center in Room 246 at FCC Headquarters, 1919 M Street, N.W., Washington, D.C. 20036.

NUMBER OF COPIES

	Trans-mittal Letter	Paper Report	Automated Report (diskette)
FCC Secretary Room 222 1919 M Street, N.W. Washington D.C. 20554	1	-	-
FCC Common Carrier Bureau Accounting & Audits Division Room 812 2000 L Street, N.W. Washington, D.C. 20554	1	1	1
FCC Common Carrier Bureau Industry Analysis Division Room 538 1919 M Street, N.W. Washington, D.C. 20554	1	1	1
Downtown Copy Center Room 246 1919 M Street Washington, D.C. 20036	1	1	1

D. Footnotes

1. If any data for the current period differs materially from that for the previous period or the corresponding period of the preceeding year and the difference is not self-explanatory but was caused by unusual circumstances, then include footnote text to explain the specific circumstances.

2. If the reporting carrier does not follow the procedures described in the row and column instructions of the attached Report Definition, it must explain any deviations from those procedures in an explanatory footnote. Such footnotes must provide detailed explanations of the procedures actually used by the carrier and its specific reasons for deviating from the procedures prescribed by the Commission's Rules. This provision should not be interpreted to mean that deviations from the prescribed rules will automatically be approved by the Commission.

3. Do not include explanatory footnotes in the transmittal letter. The footnote text must be included in the Footnote Text Records and the Footnote Table as specified in the Automated Report Specifications.

E. Errata

1. Carriers are under a legal obligation to correct any erroneous data discovered in FCC Report 43-05. Submissions containing corrected data must include references to indicate which data items were corrected since the previous submission.

2. Those references must be included in the Erratum Records and the Erratum Table as specified in the Automated Report Specifications.

F. Certification

1. Carriers must certify the accuracy of the data submitted in FCC Report 43-05 by including a signed certification statement as the last page of the paper report.

2. The text of the certification statement is included on page 19 of 19 in the attached report definition.

G. Waivers

1. If a carrier determines that it will be unable to provide data required by FCC Report 43-05, it must file an application for waiver with the Commission following established Commission procedures. All such requests from a carrier should be included in a single application. The application must demonstrate good cause for reporting a different or lower level of detail and indicate how these deficiencies will be corrected.

2. Omission of individual data items or entries, without request for waiver, is unacceptable. One reason that compliance with the full requirements is so important is that omission of any single data entry by any carrier will jeopardize the accuracy of aggregate industry information.

H. Public Information

1. The paper reports filed as Report 43-05 may be examined by the public from 9:00 to 11:00 a.m. and from 2:00 to 4:00 p.m., Monday through Friday, in Room 812, 2000 L Street, N.W., Washington, D.C.

2. Copies of the paper or automated reports filed as Report 43-05 may be obtained from the FCC's contractor for public records duplication, Downtown Copy Center at (202) 452-1422.

For further information regarding these procedures, contact:

Barbara Van Hagen
FCC Common Carrier Bureau
Accounting & Audits Division
(202) 634-1861

Estimated Burden Hours Per Response: 833 hours

SUMMARY

This document provides the Report Definition for FCC Report 43-05, the ARMIS Service Quality Report which must be provided quarterly by study area. It contains the following:

	PAGE
Table I - Installation Intervals Table	3
Table II - Repair Intervals and Trouble Reports Table	4
Table III - Trunk Blockage Table	5
Table IV - Total Switch Downtime Table	6
Table IV.A - Occurrences of Two Minutes or More Duration Down	7
Table V - Service Quality Complaints Table	10
Table I - Row Instructions	11
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Table IV - Column Descriptions	17
Table IV.A - Column Descriptions	18
Table V - Column Descriptions	18
Certification	19

All percentage amounts must be entered in percent and rounded to 1 decimal place. All minutes must be rounded to the nearest tenth. Number of Access Lines must be rounded to the nearest thousand.

All fields must be populated. If there are no data applicable to a field, enter zero in that field. If a filing carrier has a waiver applicable to a certain field, enter zero in that field and footnote the reason for entering zero.

Do not include explanatory footnotes in the transmittal letter; such notes must be included in the Footnotes section of the filing.

NOTICE: The ARMIS Service Quality Report collects data designed to capture trends in service quality under price cap regulation and improves and standardizes existing reporting requirements for this purpose. The ARMIS Service Quality Report specifies information requirements in a consistent format and is essential to the FCC to monitor service quality under price cap regulation. Your response is mandatory.

Public reporting burden for this collection of information is estimated to average 833 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden to the Federal Communications Commission, Office of Managing Director, Washington D.C. 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxxxxx SUBMISSION x
PERIOD: From xxxx yyyy To xxxx yyyy TABLE I
COSA: xxxx

TABLE I - INSTALLATION AND REPAIR INTERVALS
(Interexchange Access)

Row	Classification	Column		
		Switched Access	Special Access	
			High Speed Special Access	All Special Access
		(a)	(b)	(c)
	INSTALLATION INTERVALS:			
0110	Total Number of Orders or Circuits		N/A	
0112	% Commitments Met		N/A	
0113	Average Missed Commitment		N/A	
	REPAIR INTERVALS:			
0120	Total Trouble Reports			
0121	Average Interval			

FCC Report 43-05
ARMIS QUARTERLY SERVICE QUALITY REPORT

Approved by OMB
3060-0395
Expires 07/31/91
xxxxxxxxxxxx VERSION
SUBMISSION x
TABLE II

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
STUDY AREA: xxxxxxxxxxxxxxxxxxxxxx
PERIOD: From xxxx yyyy To xxxx yyyy
COSA: xxxx

TABLE II - INSTALLATION AND REPAIR INTERVALS
(Local Service)

Row	Classification	Column						
		Residence			Business			
		MSA	Non-MSA	Total	MSA	Non-MSA	Total	Total
		(d)	(e)	(f)	(g)	(h)	(i)	(j)
	INSTALLATION INTERVALS:							
0130	Installation Orders							
0132	% Commitments Met							
0133	Avg Missed Commit							
	REPAIR INTERVALS:							
0140	Total Access Lines							
0141	Init Trouble Reports							
0142	Rep Trouble Reports							
0143	No Trouble Found							

FCC Report 43-05
ARMIS QUARTERLY SERVICE QUALITY REPORT

Approved by OMB
3060-0395
Expires 07/31/91

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
STUDY AREA: xxxxxxxxxxxxxxxxxxxxx
PERIOD: From xxxx yyyy To xxxx yyyy
COSA: xxxx

xxxxxxxxxxxx VERSION
SUBMISSION x
TABLE III

TABLE III - TRUNK BLOCKAGE

Row	Classification	Column		
		Month 1	Month 2	Month 3
		(k)	(l)	(m)
0180	Total Trunk Groups			
0181	Groups Measured			
0182	Groups Exceed Threshhold 3Mos			
0183	Groups Exceed Threshhold 1 Mo			
0184	Groups Exceed Objectives 3Mos			

FCC Report 43-05
ARMIS QUARTERLY SERVICE QUALITY REPORT

Approved by OMB
3060-0395
Expires 07/31/91

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
STUDY AREA: xxxxxxxxxxxxxxxxxxxxx
PERIOD: From xxxx yyyy To xxxx yyyy
COSA: xxxx

xxxxxxxxxxxx VERSION
SUBMISSION x
TABLE IV

TABLE IV - TOTAL SWITCH DOWNTIME

Row	Classification	Column					
		Total Number Switches (n)	No Switch Downtime (o)	Total Switch Downtime (p)	Incidents Under 2 (q)	Number Unscheduled (r)	Percent Unscheduled (s)
0200	MSA						
0201	Non-MSA						
0210	Switches Under 1000 Lines						
0211	Switches 1000-4999 Lines						
0212	Switches 5000-9999 Lines						
0213	Switches 10000-19999 Lines						
0214	Switches Over 20,000 Lines						

FCC Report 43-05
ARMIS QUARTERLY SERVICE QUALITY REPORT

Approved by OMB
3060-0395
Expires 07/31/91

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
STUDY AREA: xxxxxxxxxxxxxxxxxxxxxx
PERIOD: From mmm yyyy To mmm yyyy
COSA: xxxx

xxxxxxxxxxxx VERSION
SUBMISSION x
TABLE IV.A

TABLE IV.A - OCCURRENCES OF TWO MINUTES OR MORE DURATION DOWNTIME

Row	Explanation (t)	Switch by CLLI (u)	Access Lines (v)	MSA (w)	Duration (x)
0220					
0221					
0222					
0223					
0224					
0225					
0226					
0227					
0228					
0229					
0230					
0231					
0232					
0233					
0234					
0235					
0236					
0237					
0238					
0239					
0240					
0241					
0242					
0243					
0244					
0245					
0246					
0247					
0248					
0249					
0250					
0251					
0252					
0253					
0254					

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxxx SUBMISSION x
PERIOD: From mmmm yyyy To mmmm yyyy TABLE IV.A
COSA: xxxx

TABLE IV.A - OCCURRENCES OF TWO MINUTES OR MORE DURATION DOWNTIME

Row	Explanation	Switch by CLLI	Access Lines	MSA	Duration
	(t)	(u)	(v)	(w)	(x)
0255					
0256					
0257					
0258					
0259					
0260					
0261					
0262					
0263					
0264					
0265					
0266					
0267					
0268					
0269					
0270					
0271					
0272					
0273					
0274					
0275					
0276					
0277					
0278					
0279					
0280					
0281					
0282					
0283					
0284					
0285					
0286					
0287					
0288					

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxxxx SUBMISSION x
PERIOD: From mmm yyyy To mmm yyyy TABLE IV.A
COSA: xxxx

TABLE IV.A - OCCURRENCES OF TWO MINUTES OR MORE DURATION DOWNTIME

Row	Explanation (t)	Switch by CLLI (u)	Access Lines (v)	MSA (w)	Duration (x)
0289					
0290					
0291					
0292					
0293					
0294					
0295					
0296					
0297					
0298					
0299					
0300					
0301					
0302					
0303					
0304					
0305					
0306					
0307					
0308					
0309					
0310					
0311					
03121					
0313					
0314					
0315					
0316					
0317					
0318					
0319					

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxxx SUBMISSION x
PERIOD: From mmmm yyyy To mmmm yyyy TABLE V
COSA: xxxx

TABLE V - SERVICE QUALITY COMPLAINTS

Row	Classification	Column		
		Total	MSA	Non-MSA
		(y)	(z)	(aa)
0320	No Business Access Lines			
0321	Fed Complaints Bus Users			
0322	State Complaints Bus Users			
0330	No Residential Access Line			
0331	Fed Complaints Res Users			
0332	State Complaints Res Users			

Quarterly Service Quality Report

General Instructions

For the purposes of this report, the terms switch, switching entity and entity are used interchangeably. The terms access lines, lines and lines in service are also used interchangeably. Switch counts are updated quarterly and access line counts are updated annually, representing year end counts.

Row Instructions

Table I

Row 0110 - Total Number of Orders or Circuits - Enter the total number of installation orders or circuits from Interexchange carriers/customers for the current reporting period on this row. This amount excludes installation orders not completed by the commitment date because the customer was not prepared to receive service on that date. If circuits are entered instead of the number of installation orders, disclose this information in a footnote to this row.

Row 0112 - % Commitments Met - Enter the percentage of commitments met during the current reporting period on this row. This amount is calculated by dividing the number of installation orders or circuits from Interexchange carriers/customers completed by commitment date by the total number of installation orders or circuits (row 0110). NOTE: The commitment dates for various kinds of installations are published by the LECs and must be kept on file with the Commission. Commitment dates may be extended at the customer's request.

Row 0113 - Average Missed Commitment - Enter the average interval, expressed in calendar days, between the commitment date and the day the service or order for Interexchange carriers/customers was completed, for all commitments not met during the current reporting period on this row. If a carrier is unable to report this amount in calendar days, business days may be entered and so footnoted.

Row 0120 - Total Trouble Reports - Enter the total number of circuit specific trouble reports referred to the LEC by interexchange carriers/customers during the current reporting period.

Row 0121 - Average Interval - Enter the average interval, in hours to the nearest tenth, from the time of the reporting carrier's receipt of the trouble report to the time of acceptance by the complaining interexchange carrier/customer.

Table II

Row 0130 - Installation Orders - Enter the total number of installation orders, or circuits, for local service customers for the current reporting period. This amount excludes installation orders not completed by the commitment date because the customer was not prepared to receive service on that date. If circuits are entered instead of the number of installation orders, disclose this information in a footnote to this row.

Row 0132 - % Commitments Met - Enter the percentage of commitments met during the current reporting period on this row. This amount is calculated by dividing the number of installation orders completed by commitment date by the total number of installation orders (row 0130).

Row 0133 - Average Missed Commitment - Enter the average interval, expressed in calendar days, between the commitment date and the day the service or order was completed, for all commitments not met during the current reporting period on this row. If a carrier is unable to report this amount in calendar days, business days may be entered and so footnoted.

Row 0140 - Total Access Lines - Access lines include all classifications of local exchange telephone service including, but not limited to, individual lines, party line access, PBX access, Centrex access, Coin access, Foreign Exchange access and WATS access. Access lines, as defined herein, is a more inclusive term than billable access lines as defined in ARMIS 43-01 and 43-04 reports. See row instructions for rows 2090 through 2140 of the ARMIS 43-01 Report and row 9010 of the ARMIS 43-04 Report for the definition of billable access lines.

Row 0141 - Initial Trouble Reports - Enter the number of trouble reports (complaints concerning service quality made by customers or end users to LECs) received by the reporting carrier during the current reporting period.

Row 0142 - Repeat Trouble Reports - Enter the number of repeat trouble reports (complaints concerning service problems that recur, or remain unresolved, within thirty days of the initial trouble report) received by the reporting carrier during the current reporting period.

Row 0143 - No Trouble Found - No trouble found refers to a trouble report investigation which finds no discernible problem. Enter the number of investigations which found no problem during the current reporting period.

Table III

Row 0180 - Total Trunk Groups - Enter the total number of common trunk groups for which the reporting carrier is responsible. Common trunk groups are trunk groups between the LEC end office and the LEC access tandem that carry Feature Group B, C and D access traffic. IntraLATA traffic may also be carried on these groups.

Row 0181 - Groups Measured - Enter the number of common trunk groups measured during the current reporting period on this row.

Row 0182 - Groups Exceeding Servicing Threshold for Three Months - Enter the number of common trunk groups which have exceeded the reporting carrier's interstate access tariff measured blocking threshold for three or more consecutive months. Trunk group servicing thresholds have been discussed in the Interexchange Carriers Compatibility Forum (ICCF) and T1Q1 Industry Forum, and are included in tariffs kept on file with the Commission. Servicing thresholds are set to indicate that there is a statistical probability that blockage is exceeding the designed blocking objective whenever such thresholds are exceeded. Servicing thresholds are generally set at 2 percent blocking for equal access trunks, and at 3 percent blocking for non-equal access trunks. The reporting carrier must disclose its thresholds in a footnote to this row. The reporting carrier must also disclose changes in its thresholds, if any, in a footnote to this row.

Row 0183 - Groups Exceeding Servicing Threshold for One Month - Enter the number of common trunk groups which have exceeded the reporting carrier's interstate access tariff measured servicing threshold for the current month.

Row 0184 - Groups Exceeding Design Blocking Objectives for Three Months - Enter the number of common trunk groups which have exceeded equipment design blocking objectives for three or more consecutive months. Design blocking objectives range from 0.5 percent to 1.0 percent of traffic in the time-consistent busy hour of the busy season. Reporting carriers must specify their design blocking objectives in a footnote to this row.

Table IV

Row 0200 - MSA - This row represents all MSAs served within the study area. MSAs, or Metropolitan Statistical Areas, are designated by the Department of Commerce in a list released following each decadal census. An MSA includes at least one city with a minimum population of 50,000, or a Census Bureau defined urbanized area of at least 50,000 population located in an area with a minimum population of 100,000. See 45 Fed. Reg. 956 (1980). This definition and the current list remain in effect until the new list of metropolitan statistical areas and changes in definition, if any, are issued in June 1992.

Row 0201 - Non-MSA - This row represents all areas in the study area which lie outside of any MSA.

Row 0210 - Switches Under 1,000 Lines - Enter the number of switches, and associated data, serving fewer than 1,000 access lines.

Row 0211 - Switches with 1,000 to 4,999 Lines - Enter the number of switches, and associated data, serving 1,000 to 4,999 access lines.

Row 0212 - Switches with 5,000 to 9,999 lines - Enter the number of switches, and associated data, serving 5,000 to 9,999 access lines.

Row 0213 - Switches with 10,000 to 19,999 Lines - Enter the number of switches, and associated data, serving 10,000 to 19,999 access lines.

Row 0214 - Switches with 20,000 and over Lines - Enter the number of switches, and associated data, serving 20,000 or more access lines.

NOTE: The sum of rows 0200 and 0201 equals the sum of rows 0210 through 0214.

Table IV.A

Rows 220 through 319 - Each of these rows is provided for entry of one occurrence of switch downtime of two or more minutes in duration. For each occurrence use one row, entering the appropriate data in the columns provided. We have assumed that no carrier will have more than 100 occurrences in a reporting quarter. If such events exceed 100 occurrences, enter the appropriate data for the remaining occurrences in a footnote to row 319.

Table V

Service Quality Complaints - Service quality complaints are complaints pertaining to service quality only. This term does not include complaints relating to billing, operator service providers, 900 or 976 services.

Row 0320 - Number of Business Access Lines - Enter the total number of business access lines as of December 31 of the previous calendar year (in thousands) in the study area on this row.

Row 0321 - Federal Complaints from Business Users - Federal complaints are complaints filed with this Commission. Enter the number of federal complaints filed by business users on this row.

Row 0322 - State Complaints from Business Users - State complaints are complaints filed with state regulatory agencies. Enter the number of state complaints filed by business users on this row.

Row 0330 - Number of Residential Access Lines - Enter the total number of residential access lines as of December 31 of the previous calendar year (in thousands) in the study area on this row.

Row 0331 - Federal Complaints from Residential Users - Enter the number of federal complaints filed by residential users on this row.

Row 0332 - State Complaints from Residential Users - Enter the number of state complaints filed by residential users on this row.

Service Quality Report

Column Descriptions

Table I

Column (a) - Switched Access - Circuit from the local exchange carrier (LEC) office to the interexchange carrier/customer Point of Presence (POP) for Feature Group B, C or D interstate service.

Special Access - Circuit from the LEC facilities to the interexchange carrier POP or customer premises for voice grade service, WATS/800, metallic and telegraph services, audio or video program services, wideband services, DDS, high-capacity, DS1, DS3, and switched Feature Group A services.

Column (b) - High Speed Special Access - Circuit from the LEC facilities to the interexchange carrier POP or customer premises for DS1, DS2, DS3 and other similar digital services.

Column (c) - All Special Access - Enter all special access data, including those entered in column (b), in this column.

Table II

Residence - Columns (d), (e) and (f) represent residential customers placing installation orders or reporting trouble to the local exchange carrier during the current reporting period.

Column (d) - MSA - MSAs, or Metropolitan Statistical Areas, are designated by the Department of Commerce in a list following each decadal census. An MSA includes at least one city with a minimum population of 50,000 and its surrounding area, or a Census Bureau defined urbanized area of at least 50,000 population located in an area with a minimum population of 100,000. See 45 Fed. Reg. 956 (1980). This definition and the current list remain in effect until the new list of metropolitan statistical areas and changes in definition, if any, are issued in June 1992. This amount represents all residential customers located within MSAs in the study area served by the reporting carrier.

Column (e) - Non-MSA - This amount represents all residential customers located outside of all MSAs in the study area served by the reporting carrier.

Column (f) - Total - This amount represents all residential customers in the study area served by the reporting carrier (the sum of columns (d) and (e)).

Business - Columns (g), (h) and (i) represent local service business customers placing installation orders or reporting trouble to the local exchange carrier during the current reporting period.

Column (g) - MSA - See column (c) for the definition of MSA. This amount represents all local service business customers located within MSAs in the study area served by the reporting carrier.

Column (h) - Non-MSA - This amount represents all local service business customers located outside of all MSAs in the study area served by the reporting carrier.

Column (i) - Total - This amount represents all business customers in the study area served by the reporting carrier (the sum of columns (g) and (h)).

Column (j) - Total - Enter the sum of columns (f) and (i) in this column.

Table III

Column (k) - Month 1 - The first month of the current reporting quarter.

Column (l) - Month 2 - The second month of the current reporting quarter.

Column (m) - Month 3 - The third month of the current reporting quarter.

Table IV

Column (n) - Total Number Switches - Switching entities (switches) are assemblies of equipment designed to establish connections between lines and trunks. Switching entities include local, class 5 switching machines and any associated remotes; e.g., a host end office and its three associated remotes will be reported as four switching entities. Switching entities designed exclusively for access tandem, class 4, or operator services are not reported here. There may be more than one switching entity per central office or wire center.

Column (o) - Number of Switches Having Downtime - This column represents the number of switches that experienced downtime during the current reporting period.

Column (p) - Total Switch Downtime - Switch downtime occurs when call processing capability for an end office is lost. Report all downtime, in cumulative minutes to the nearest tenth, in this column.

Column (q) - Incidents Under Two Minutes - This amount represents the number of incidents of downtime under two minutes in duration.

Column (r) - Number Unscheduled - This amount represents the number of incidents of switch downtime under two minutes in duration that were not scheduled for routine maintenance or network upgrades. Scheduled downtime refers to those times when a switch is taken down at a predetermined time so that it may be upgraded. Such downtimes usually occur during non-busy hours.

Column (s) - Percent Unscheduled - This amount represents the percent of downtime that is not scheduled for routine maintenance or network upgrades. (The ratio of column (r) to column (q), in percent).

Table IV.A

Column (t) - Explanation - If the switch was down as the result of some event that was totally outside of the control of the reporting carrier, enter a one word explanation in this column; for example, tornado, earthquake, fire, hurricane, etc. Otherwise, enter scheduled or unscheduled, as appropriate.

Column (u) - Switch by CLLI - See description for column (k), Table IV. Enter the eight digit CLLI (Common Language Location Identifier) code which identifies the switch that experienced downtime of two minutes or more, to the nearest tenth, in duration. Enter data for only one outage incident on a row.

Column (v) - Access Lines - The number of working network access lines served by the switch.

Column (w) - MSA - See Table II, column (c) for the definition of MSA. Enter Y if the incident involved a downed switch that lies within an MSA in the study area served. Enter N if the incident involved a downed switch outside of all MSAs in the study area served.

Column (x) - Duration - Enter the duration of the outage in minutes, to the nearest tenth, in this column.

Table V

Column (y) - Total - Enter the appropriate total study area amounts for rows 0320, 0321, 0322, 0330, 0331 and 0332 in this column. The amount in this column equals the sum of columns (z) and (aa).

Column (z) - MSA - See Table II, column (d) for the definition of MSA. Enter the appropriate MSA amounts for rows 0320, 0321, 0322, 0330, 0331 and 0332 in this column.

Column (aa) - Non-MSA - Enter the appropriate non-MSA amounts for rows 0320, 0321, 0322, 0330, 0331 and 0332 in this column.

CERTIFICATION

I certify that I am an officer of _____;
that I have examined the foregoing report and that to the best of my knowledge, information, and belief, all statements of fact contained in this report are true and that said report is an accurate statement of the affairs of the above named respondent in respect to the data set forth herein for the period from _____ to _____.

PRINTED NAME _____

POSITION _____

SIGNATURE _____

DATE _____

(Persons making willful false statements in this report form can be punished by fine or imprisonment under the Communications Act, 47 U.S.C. 220(e).)

CONTACT PERSON _____

TELEPHONE NUMBER _____

This document provides the instructions for FCC Report 43-06, the ARMIS Semi-Annual Service Quality Report, which was adopted in CC Docket No. 87-313. The instructions consist of the following sections, which are attached.

1. Reporting Procedures - details on the specific procedures to be followed when submitting this report to the Commission.

2. Report Definition - an illustration of the rows and columns to be reported and their definitions.

A. Introduction

This document contains details on the specific procedures to be followed when submitting FCC Report 43-06, the ARMIS Semi-Annual Service Quality Report, to the Commission.

B. General Information

1. FCC Report 43-06 was adopted by the Commission in the LEC Price Cap Order, Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786, 6827-30 (1990). This report is prescribed for every local exchange carrier for whom price cap regulation is mandatory.

2. Affected carriers shall file by March 31 and September 30 of each year, the report for the previous calendar half. The initial report will be filed in September, 1991 and will contain data for the first half of calendar year 1991.

3. The report shall be filed on a study area (jurisdiction) basis.

4. Each report and diskette must be clearly labeled to include the report number, company, study area, period, COSA code, version and submission number. The report number is 43-06, which identifies the filing as the ARMIS Semi-Annual Service Quality Report. The period identifies the year and half covered by the data. See the attached COSA Code Table (CO = Company, SA = Study Area) for a list of companies and their respective COSAs. The version refers to whether the filing is confidential, public or unrestricted. The submission number is defined as follows: Submission 0 is for test data purposes only. Submission 1 is the first submission of a half's data. Higher numbers (2, 3, etc.) would be used if needed for successive revisions to correct that half's submission.

5. All correspondence and pleadings shall identify the proceeding as CC Docket No. 87-313.

C. Where to File

1. Carriers submitting FCC Report 43-06 should consult the schedule below which details the number of copies required and the location to which those copies should be delivered.

2. Carriers are reminded that they must serve a copy of both the paper report and the automated report (diskette) on the FCC's contractor for public records duplication, Downtown Copy Center at 1114 21st. Street, N.W., Washington, D.C. 20036 or delivered to Downtown Copy Center in Room 246 at FCC Headquarters, 1919 M Street, N.W., Washington, D.C. 20036.

NUMBER OF COPIES

	Trans-mittal Letter	Paper Report	Automated Report (diskette)
FCC Secretary Room 222 1919 M Street, N.W. Washington D.C. 20554	1	-	-
FCC Common Carrier Bureau Accounting & Audits Division Room 812 2000 L Street, N.W. Washington, D.C. 20554	1	1	1
FCC Common Carrier Bureau Industry Analysis Division Room 538 1919 M Street, N.W. Washington, D.C. 20554	1	1	1
Downtown Copy Center Room 246 1919 M Street Washington, D.C. 20036	1	1	1

D. Footnotes

1. If any data for the current period differs materially from that for the previous period or the corresponding period of the preceeding year and the difference is not self-explanatory but was caused by unusual circumstances, then include footnote text to explain the specific circumstances.

2. If the reporting carrier does not follow the procedures described in the row and column instructions of the attached Report Definition, it must explain any deviations from those procedures in an explanatory footnote. Such footnotes must provide detailed explanations of the procedures actually used by the carrier and its specific reasons for deviating from the procedures prescribed by the Commission's Rules. This provision should not be interpreted to mean that deviations from the prescribed rules will automatically be approved by the Commission.

3. Do not include explanatory footnotes in the transmittal letter. The footnote text must be included in the Footnote Text Records and the Footnote Table as specified in the Automated Report Specifications.

E. Errata

1. Carriers are under a legal obligation to correct any erroneous data discovered in FCC Report 43-06. Submissions containing corrected data must include references to indicate which data items were corrected since the previous submission.

2. Those references must be included in the Erratum Records and the Erratum Table as specified in the Automated Report Specifications.

F. Certification

1. Carriers must certify the accuracy of the data submitted in FCC Report 43-06 by including a signed certification statement as the last page of the report.

2. The text of the certification statement is included on page 6 of 6 in the attached report definition.

G. Waivers

1. If a carrier determines that it will be unable to provide data required by FCC Report 43-06, it must file an application for waiver with the Commission following established Commission procedures. All such requests from a carrier should be included in a single application. The application must demonstrate good cause for reporting a different or lower level of detail and indicate how these deficiencies will be corrected.

2. Omission of individual data items or entries, without request for waiver, is unacceptable. One reason that compliance with the full requirements is so important is that omission of any single data entry by any carrier will jeopardize the accuracy of aggregate industry information.

H. Public Information

1. The paper reports filed as Report 43-06 may be examined by the public from 9:00 to 11:00 a.m. and from 2:00 to 4:00 p.m., Monday through Friday, in Room 812, 2000 L Street, N.W., Washington, D.C.

2. Copies of the paper or automated reports filed as Report 43-06 may be obtained from the FCC's contractor for public records duplication, Downtown Copy Center at (202) 452-1422.

For further information regarding these procedures, contact:

Barbara Van Hagen
FCC Common Carrier Bureau
Accounting & Audits Division
(202) 634-1861

SUMMARY

This document provides the Report Definition for FCC Report 43-06, the ARMIS Semi-Annual Service Quality Report which must be provided semi-annually by study area. It contains the following:

	PAGE
Table II - Dial Tone Response and Transmission Quality	2
Table II - Row Instructions	3
Table II - Column Instructions	5
Certification	6

All percentage amounts must be entered in percent and rounded to 1 decimal place.

All fields must be populated. If there are no data applicable to a field, enter zero in that field.

Do not include explanatory footnotes in the transmittal letter; such notes must be included in the Footnotes section of the filing.

NOTICE: The ARMIS Semi-Annual Service Quality Report collects data designed to capture trends in service quality under price cap regulation and improves and standardizes existing reporting requirements for this purpose. The ARMIS Semi-Annual Service Quality Report specifies information requirements in a consistent format and is essential to the FCC to monitor service quality under price cap regulation. Your response is mandatory.

This report is prescribed for every mandatory price cap local exchange carrier and is not subject to the clearance procedures of 44 USC 3507 pursuant to the less than ten rule. Send comments regarding any aspect of this collection of information, including suggestions for reducing the burden to the Federal Communications Commission, Office of Managing Director, Washington D.C. 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

FCC Report 43-06
ARMIS SEMIANNUAL SERVICE QUALITY REPORT

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxxxxx SUBMISSION x
PERIOD: From mmm yyyy To mmm yyyy TABLE II
COSA: xxxx

TABLE II - DIAL TONE RESPONSE AND TRANSMISSION QUALITY

ROW		COLUMN
		TOTAL STUDY AREA
		(a)
	PERCENT OF OFFICES PERFORMING AT OR ABOVE DIAL TONE SPEED OBJECTIVE LEVEL:	
0200	Percent of Offices at or Above Objective	
0210	Number of Offices Measured	
0220	Objective Delay	
0230	Objective Percent of Calls for Each Office	
	PERCENT OF OFFICES MEETING ALL TRANSMISSION OBJECTIVES:	
0240	Percent of Offices Meeting Loss Objectives	
0241	Percent Offices Meeting C-Message Objectives	
0242	Percent of Offices Meeting Balance Objectives	
0243	Percent Offices Meeting Gain Slope Objectives	
0244	Percent of Offices Meeting C-Notch Objectives	
	PERCENT OF TRUNKS MEETING ALL TRANSMISSION OBJECTIVES:	
0250	Percent of Trunks Meeting Loss Objectives	
0251	Percent of Trunks Meeting Noise Objectives	
0252	Percent of Trunks Meeting Balance Objectives	
0253	Percent Trunks Meeting Gain Slope Objectives	
0254	Percent of Trunks Meeting C-Notch Objectives	

Semi-Annual Service Quality Report

General Instructions

Table I of this report is not standardized and is not, therefore, required to be filed in the ARMIS format. Table I will continue to be filed with the Industry Analysis Division using the same procedures that have been used in the past for filing the Semi-Annual Service Quality Report. Table II of this report is standardized and is required to be filed under ARMIS.

Row Instructions

Table II

Rows 0200 through 0230 measure the ability of the switching equipment to provide dial tone for an originating call attempt within a specified period of time. The results of the test measurement are reflected in these rows as the percentage of dial offices which give dial tone within three seconds of lifting the telephone instrument. The measured performance is derived from call attempt samples taken during the central office busy hours. An office is considered to pass the performance test if a specified number of test calls receive dial tone within the three second criterion.

Row 0200 - Percent Sample at Objective Level - Enter the number of offices passing the measurement standard divided by the number of offices measured.

0210 - Number of Offices Measured - Enter the number of offices tested for dial tone speed.

Row 0220 - Objective Delay - Enter the maximum number of seconds for receiving dial tone (usually three seconds).

Row 0230 - Objective Percent of Calls for Each Office - Enter the percentage of call attempts sampled which must receive dial tone within the time specified (see row 0220) for an office to pass the measurement standard.

Row 0240 - Percent of Offices Meeting Loss Objectives - Enter the percentage of offices passing tests for signal attenuation or loss.

Row 0241 - Percent of Offices Meeting C-Message Objectives - Enter the percentage of offices passing tests for noise over the audible spectrum weighted in a manner consistent with human hearing.

Row 0242 - Percent of Offices Meeting Balance Objectives - Enter the percentage of offices passing tests for balance which determines the amount of echo heard by the subscriber.

Row 0243 - Percent of Offices Meeting Gain Slope Objectives - Enter the percentage of offices passing tests for gain slope which is a measure of distortion.

Row 0244 - Percent of Offices Meeting C-Notch Objectives - Enter the percentage of offices passing tests for noise in specified portions of the signal bandwidth.

Row 0250 - Percent of Trunks Meeting Loss Objectives - Enter the percentage of trunks which must pass the loss test and the technical requirement for an office to pass (maintenance limit).

Row 0251 - Percent of Trunks Meeting Noise Objectives - Enter the percentage of trunks which must pass the noise test and the technical requirement for an office to pass (Maintenance limit).

Row 0252 - Percent of Trunks Meeting Balance Objectives - Enter the percentage of trunks which must pass the balance test and the technical requirement for an office to pass (maintenance limit).

Row 0253 - Percent of Trunks Meeting Gain Slope Objective - Enter the percentage of trunks which must pass the gain slope test and the technical requirement for an office to pass (maintenance limit).

Row 0254 - Percent of Trunks Meeting C-Notch Objectives - Enter the percentage of trunks which must pass the C-notch test and the technical requirement for an office to pass (maintenance limit).

-Semi-Annual Service Quality Report

Column Descriptions

Table II

Column (a) - Total Study Area - This column represents the total study area. A study area usually consists of a telephone company's service territory in a given state, although telephone companies occasionally have more than one study area in a particular state.

CERTIFICATION

I certify that I am an officer of _____; that I have examined the foregoing report and that to the best of my knowledge, information, and belief, all statements of fact contained in this report are true and that said report is an accurate statement of the affairs of the above named respondent in respect to the data set forth herein for the period from _____ to _____.

PRINTED NAME _____

POSITION _____

SIGNATURE _____

DATE _____

(Persons making willful false statements in this report form can be punished by fine or imprisonment under the Communications Act, 47 U.S.C. 220(e).)

CONTACT PERSON _____

TELEPHONE NUMBER _____

This document provides the instructions for FCC Report 43-07, the ARMIS Infrastructure Report, which was adopted by the Commission in CC Docket No. 87-313. The instructions consist of the following sections, which are attached.

1. Reporting Procedures - details on the specific procedures to be followed when submitting this report to the Commission.

2. Report Definition - an illustration of the rows and columns to be reported and their definitions.

A. Introduction

This document contains details on the specific procedures to be followed when submitting FCC Report 43-07, the ARMIS Infrastructure Report, to the Commission.

B. General Information

1. FCC Report 43-07 was adopted by the Commission in the LEC Price Cap Order, Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786, 6827-30 (1990). This report is prescribed for every mandatory price cap local exchange carrier. This report is not subject to the clearance procedures of 44 USC 3507 because there are less than ten respondents.

2. Affected carriers shall file by June 30 of each year for the previous calendar year. The initial report will be filed in June 1991 and will contain data for the 1990 calendar year.

3. The report shall be filed on a study area (jurisdiction) basis.

4. Each report and diskette must be clearly labeled to include the report number, company, study area, period, COSA code, version and submission number. The report number is 43-07, which identifies the filing as the ARMIS Infrastructure Report. The period identifies the year covered by the data. See the attached COSA Code Table (CO = Company, SA = Study Area) for a list of companies and their respective COSAs. The version refers to whether the filing us confidential, public or unrestricted. The submission number is defined as follows: Submission 0 is for test data purposes only. Submission 1 is the first submission of a quarter's data. Higher numbers (2, 3, etc.) would be used if needed for successive revisions to correct that quarter's submission.

5. All correspondence and pleadings shall identify the proceeding as CC Docket No. 87-313.

C. Where to file

1. Carriers submitting FCC Report 43-07 should consult the schedule below which details the number of copies required and the location to which those copies should be delivered.

2. Carriers are reminded that they must serve a copy of both the paper report and the automated report (diskette) on the FCC's contractor for public records duplication, Downtown Copy Center at 1114 21st. Street, N.W., Washington D.C. 20036 or delivered to Downtown Copy Center in Room 246 at FCC Headquarters, 1919 M Street, N.W., Washington, D.C. 20036.

NUMBER OF COPIES

	Transmittal Letter	Paper Report	Automated Report (diskette)
FCC Secretary Room 222 1919 M Street, N.W. Washington D.C. 20554	1	-	-
FCC Common Carrier Bureau Accounting & Audits Division Room 812 2000 L Street, N.W. Washington, D.C. 20554	1	1	1
FCC Common Carrier Bureau Industry Analysis Division Room 538 1919 M Street, N.W. Washington, D.C. 20554	1	1	1
Downtown Copy Center Room 246 1919 M Street Washington, D.C. 20036	1	1	1

D. Footnotes

1. If any data for the current period differs materially from that for the previous period or the corresponding period of the preceeding year and the difference is not self-explanatory but was caused by unusual circumstances, then include footnote text to explain the specific circumstances.

2. If the reporting carrier does not follow the procedures described in the row and column instructions of the attached Report Definition, it must explain any deviations from those procedures in an explanatory footnote. Such footnotes must provide detailed explanations of the procedures actually used by the carrier and its specific reasons for deviating from the procedures prescribed by the Commission's Rules. This provision should not be interpreted to mean that deviations from the prescribed rules will automatically be approved by the Commission.

3. Do not include explanatory footnotes in the transmittal letter. The footnote text must be included in the Footnote Text Records and the Footnote Table as specified in the Automated Report Specifications.

E. Errata

1. Carriers are under a legal obligation to correct any erroneous data discovered in FCC Report 43-07. Submissions containing corrected data must include references to indicate which data items were corrected since the previous submission.

2. Those references must be included in the Erratum Records and the Erratum Table as specified in the Automated Report Specifications.

F. Certification

1. Carriers must certify the accuracy of the data submitted in FCC Report 43-07 by including a signed certification statement as the last page of the paper report.

2. The text of the certification statement is included on page 21 of 21 in the attached report definition.

G. Waivers

1. If a carrier determines that it will be unable to provide data required by FCC Report 43-07, it must file an application for waiver with the Commission following established Commission procedures. All such requests from a carrier should be included in a single application. The application must demonstrate good cause for for reporting a different or lower level of detail and indicate how these deficiencies will be corrected.

2. Omission of individual data items or entries, without request for waiver, is unacceptable. On reason that compliance with the full requirements is so important is that omission of any single data entry by any carrier will jeopardize the accuracy of aggregate industry information.

H. Public Information

1. The paper reports filed as Report 43-07 may be examined by the public from 9:00 to 11:00 a.m. and from 2:00 to 4:00 p.m., Monday through Friday, in Room 812, 2000 L Street, N.W., Washington, D.C.

2. Copies of the paper or automated reports filed as Report 43-07 may be obtained from the FCC's contractor for public records duplication, Downtown Copy Center at (202) 452-1422.

For further information regarding these procedures, contact:

Barbara Van Hagen
FCC Common Carrier Bureau
Accounting & Audits Division
(202) 634-1861

SUMMARY

This document provides the Report Definition for FCC Report 43-07, the ARMIS Infrastructure Report which must be provided annually by study area. It contains the following:

	PAGE
Table I - Switching Equipment Table	2
Table II - Transmission Facilities Table	4
Table III - LEC Call Set-Up Time Table	6
Table IV - Additions and Book Costs Table	7
Table I - Row Instructions	8
Table II - Row Instructions	14
Table III - Row Instructions	17
Table IV - Row Instructions	18
Table I - Column Descriptions	19
Table II - Column Descriptions	19
Table III - Column Descriptions	19
Table IV - Column Descriptions	20
Certification	21

All percentage amounts must be entered in percent and rounded to 1 decimal place. All kilometers must be rounded to 2 decimal places. All monetary figures must be rounded to the nearest thousand dollars. All access lines must be rounded to the nearest thousand.

All fields must be populated. If there are no data applicable to a field, enter zero in that field.

Do not include explanatory footnotes in the transmittal letter; such notes must be included in the Footnotes section of the filing.

NOTICE: The ARMIS Infrastructure Report collects data designed to capture trends in telephone industry infrastructure development under price cap regulation and improves and standardizes existing reporting requirements for this purpose. The ARMIS Infrastructure Report specifies information requirements in a consistent format and is essential to the FCC to monitor service quality under price cap regulation. Your response is mandatory.

This report is prescribed for every mandatory price cap local exchange carrier and is not subject to the clearance procedures of 44 USC 3507 pursuant to the less than ten rule. Send comments regarding any aspect of this collection of information, including suggestions for reducing the burden to the Federal Communications Commission, Office of Managing Director, Washington D.C. 20554, and to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D.C. 20503.

FCC Report 43-07
ARMIS INFRASTRUCTURE REPORT

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
STUDY AREA: xxxxxxxxxxxxxxxxxxx
PERIOD: From mmmm yyyy To mmmm yyyy
COSA: xxxx

xxxxxxxxxxxx VERSION
SUBMISSION X
TABLE I

TABLE I - SWITCHING EQUIPMENT

ROW	COLUMN		
	TOTAL STUDY AREA	WITHIN MSA	NON-MSA
	(a)	(b)	(c)
SWITCHING ENTITIES/LINES IN SERVICE:			
0110 Total Switching Entities			
0111 Local Switches			
0112 Tandems		N/A	N/A
0113 Hosts			
0114 Remotes (Stand Alone Only)			
0120 Total Number Access Lines in Service			
TYPE OF SWITCH:			
0130 Total E/M Switches			
0131 Percent Total Switches			
0132 E/M Local Switches			
0133 Percent Local Switches			
0134 E/M Tandems		N/A	N/A
0135 Percent Total Tandems		N/A	N/A
0140 E/M Lines Served			
0141 Percent Total Lines			
0150 Total ASPC Switches			
0151 Percent Total Switches			
0152 ASPC Local Switches			
0153 Percent Local Switches			
0154 ASPC Tandems		N/A	N/A
0155 Percent Total Tandems		N/A	N/A
0160 ASPC Lines Served			
0161 Percent Total Lines			
0170 Total DSPC Switches			
0171 Percent Total Switches			
0172 DSPC Local Switches			
0173 Percent Local Switches			
0174 DSPC Tandems		N/A	N/A
0175 Percent Total Tandems		N/A	N/A
0180 DSPC Lines Served			
0181 Percent Total Lines			
SWITCHING CAPABILITY:			
0190 Switches Equipped for Equal Access			
0191 Percent Total Switches			

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxxx SUBMISSION X
PERIOD: From mmmm yyyy To mmmm yyyy TABLE I
COSA: xxxx

TABLE I - SWITCHING EQUIPMENT

ROW		COLUMN		
		TOTAL STUDY AREA (a)	WITHIN MSA (b)	NON-MSA (c)
0200	Access Lines with Equal Access			
0201	Percent Total Lines			
0210	Touch-Tone Capable Switches			
0211	Percent Total Switches			
0220	Access Lines with Touch-Tone Capability			
0221	Percent Total Lines			
0230	Total Switches Equipped with SS7-394			
0231	Percent Total Switches			
0232	Lines with Access to SS7-394			
0233	Percent Total Access Lines			
0234	Total Switches Equipped with SS7-317			
0235	Percent Total Switches			
0236	Lines with Access to SS7-317			
0237	Percent Total Access Lines			
0240	Local Switches Equipped with SS7-394			
0241	Percent Total Local Switches			
0246	Local Switches Equipped with SS7-317			
0247	Percent Total Local Switches			
0250	Tandems Equipped with SS7-394		N/A	N/A
0251	Percent Total Tandems		N/A	N/A
0256	Tandems Equipped with SS7-317		N/A	N/A
0257	Percent Total Tandems		N/A	N/A
0270	Total Switches Equipped with ISDN			
0271	Percent Total Switches			
0280	Local Switches Equipped with ISDN			
0281	Percent Total Local Switches			
0290	Tandems Equipped with ISDN		N/A	N/A
0291	Percent Total Tandems		N/A	N/A
0300	Lines with Potential Access to ISDN			
0301	Percent Total Lines			
0311	Basic Rate ISDN (BRI) Interfaces Equipped			
0312	Primary Rate ISDN (PRI) Interfaces Equipped			

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COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxxx SUBMISSION X
PERIOD: From mmm yyyy To mmm yyyy TABLE II
COSA: xxxx

TABLE II - TRANSMISSION FACILITIES

ROW	COLUMN
	TOTAL STUDY AREA
	(d)
SHEATH KILOMETERS:	
0320 Total Sheath Kilometers	
0321 Copper	
0322 Fiber	
0323 Other	
INTEROFFICE WORKING FACILITIES:	
0330 Total Circuit Links	
0331 Baseband	
0332 Analog CXR	
0333 Digital CXR	
0350 Analog Carrier Links	
0351 Copper	
0352 Radio	
0360 Digital Carrier Links	
0361 Copper	
0362 Radio	
0363 Fiber	
LOOP PLANT - CENTRAL OFFICE TERMINATIONS:	
0370 Total Working Channels	
0380 Copper	
0381 Baseband	
0382 Analog CXR	
0383 Digital CXR	
0390 Fiber Digital CXR	
0410 Other	

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ARMIS INFRASTRUCTURE REPORT

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxxx SUBMISSION X
PERIOD: From mmm yyyy To mmm yyyy TABLE II
COSA: xxxx

TABLE II - TRANSMISSION FACILITIES

ROW	COLUMN
	TOTAL STUDY AREA
	(d)
0420 Total Equipped Channels	
0430 Copper	
0431 Baseband	
0432 Analog CXR	
0433 Digital CXR	
0440 Fiber Digital CXR	
0460 Other	
OTHER TRANSMISSION FACILITY DATA:	
0470 Copper Prs Term Main Frame (Loop Plant Only)	
0480 Fiber Strands Term in the CO (Loop Plnt Only)	
0481 Fiber Term at Customer Premises DS0 Rate	
0482 Fiber Term at Customer Premises DS1 Rate	
0483 Fiber Term at Customer Premises DS2 Rate	
0484 Fiber Term at Cust Prem DS3 Rate and higher	

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ARMIS INFRASTRUCTURE REPORT

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxx SUBMISSION x
PERIOD: From mmm yyyy To mmm yyyy TABLE III
COSA: xxxx

TABLE III - LEC CALL SET-UP TIME

Row	Classification	Column					
		Average Call Set-Up Time					
			Direct		Via Access Tandem		
		End Offices	SS7-394	MF	SS7-394	MF	Mixed
		(e)	(f)	(g)	(h)	(i)	(j)
	TIME:						
0510	Total						
0511	End Offices/EMs						
0512	End Offices/SPC Analogs						
0513	End Offices/Digitals						
	PERCENT						
0520	Total Access Lines						
0521	Access Lines/EMs						
0522	Access Lines SPC/Analog						
0523	Access Lines/Digitals						

FCC Report 43-07
ARMIS INFRASTRUCTURE REPORT

COMPANY: xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxx VERSION
STUDY AREA: xxxxxxxxxxxxxxxxxxx SUBMISSION X
PERIOD: From mmmm yyyy To mmmm yyyy TABLE IV
COSA: xxxx

TABLE IV - ADDITIONS AND BOOK COSTS

ROW		COLUMN
		TOTAL STUDY AREA
		(1)
0530	Total Access Lines in Service	
0531	Access Line Gain	
0540	Total Gross Capital Expenditures	

Infrastructure Report

General Instructions

For the purposes of this report, the terms switch, switching entity and entity are used interchangeably. The terms access lines, lines and lines in service are also used interchangeably.

Row Instructions

Table I

Switching Entities - Switching entities are assemblies of equipment designed to establish connections between lines and trunks. Switching entities include access tandems, local, class 5 switching machines and any associated remotes; e.g., a host end office and its three associated remotes will be reported as four switching entities. There may be more than one switching entity per central office or wire center. Switching entities designed exclusively for operator services are not reported here.

Lines in Service - Access lines include all classifications of local exchange telephone service including, but not limited to, individual lines, party line access, PBX access, Centrex access, Coin access, Foreign Exchange access and WATS access. Access lines, as defined herein, is a more inclusive term that billable access lines, as defined in the ARMIS 43-01 and 43-04 reports. See row instructions for rows 2090 through 2140 of the ARMIS 43-01 report and for row 9010 of the ARMIS 43-04 report for the definition of billable access lines.

Row 0110 - Total Switching Entities - Enter the total number of local and access tandem switching entities on this row. This amount is equal to the sum of rows 0130, 0150 and 0170. Tandem switching entities are used to connect local switching entities with local switching entities in other central offices. This report includes those tandems that are designed exclusively to establish connections between trunks. Since some switches are used for both local and access tandem switching, the sum of rows 0111 and 0112 may be greater than the amounts entered on this row. For example, if there are 6 local switches, 4 tandem switches and 5 switches that are used for both local and tandem switching, row 0111 would equal 11 local switches, row 0112 would equal 9 switches, and row 0110 would equal 15 switches. In this case, the sum of rows 0111 and 0112 (20) would be greater than the amount of total switching entities (15). Since we are asking only for the number of remotes with stand alone capability, the total of rows 0113 and 0114 will be less than the amounts entered on this row. For example, if there are 16 total switching entities, and there are 3 hosts and 7 remotes that have stand alone capability, the sum of rows 0113 and 0114 (10) would be less than the amount of total switching entities (16).

Row 0111 - Local Switches - Enter the total number of switches used as local switches on this row. This amount is equal to the sum of rows 132, 152 and 172.

Row 0112 - Access Tandems - Enter the total number of switches with access tandem capability on this row. This amount is equal to the sum of rows 134, 154 and 174.

Row 0113 - Hosts - A host is a switch serving one or more remotes.

Row 0114 - Remotes - A remote switching entity can generally be described as a switching entity that has no connection to the facilities network except through one other (host) switching entity, that shares the processing capabilities of another switching system for certain control functions under the direction of the host central processor, and that can be controlled remotely by the host over a pair of dedicated data links. All types of remote switches are included with the switching entity counts. However, row 0114 excludes separate reporting of remotes that are incapable of providing stand alone operation when the host switch fails. Only those remote switching entities that are equipped to operate in a stand alone fashion (i.e., able to operate when the host fails, or the data links to the host fail) to be able to provide more limited service, are to be reported on row 0114. Remote entities that are not within this description should not be included on this row.

Row 0120 - Total Number Access Lines in Service - Enter the total number of access lines in service on this row. This amount is equal to the sum of rows 0140, 0160 and 0180.

Type of Switch - Types of switches include Electro-Mechanical (E/M), e.g., Step-by-Step and Crossbar; Analog Stored Program Controlled (ASPC); and Digital Stored Program Controlled (DSPC).

Row 0130 - Total E/M Switches - Enter the total number of local and tandem Electro-Mechanical switches on this row. Since some switches are used for both local and tandem switching, the sum of rows 132 and 134 may be greater than the amounts entered on this row (see example, row 0110).

Row 0131 - Percent Total Switches - Enter the ratio of Electro-Mechanical switches to total switches, in percent (row 130 divided by row 110).

Row 0132 - E/M Local Switches - Enter the total number of Electro-Mechanical switches used as local switches on this row.

Row 0133 - Percent Local Switches - Enter the ratio of Electro-Mechanical local switches to total local switches, in percent (row 0132 divided by row 0111).

Row 0134 - E/M Tandems - Enter the total number of Electro-Mechanical switches with tandem capability on this row.

Row 0135 - Percent Total Tandems - Enter the ratio of Electro-Mechanical Tandems to total tandems, in percent (row 0134 divided by 0112).

Row 0140 - E/M Lines Served - Enter the number of lines served by Electro-Mechanical switches.

Row 0141 - Percent Total Lines - Enter the ratio of lines served by Electro-Mechanical switches to total lines in service, in percent (row 0140 divided by row 0120).

Row 0150 - Total ASPC Switches - Enter the total number of local and tandem Analog Stored Program Controlled switches. Since some switches are used for both local and tandem switching, the sum of rows 152 and 154 may be greater than the amounts entered on this row (see example, row 0110).

Row 0151 - Percent Total Switches - Enter the ratio of Analog Stored Program Controlled switches to total switches, in percent (row 0150 divided by row 0110).

Row 0152 - ASPC Local Switches - Enter the total number of Analog Stored Program Controlled switches used as local switches on this row.

Row 0153 - Percent Local Switches - Enter the ratio of Analog Stored Program Controlled local switches to total local switches, in percent (row 0152 divided by row 0111).

Row 0154 - ASPC Tandems - Enter the total number of Analog Stored Program Controlled switches with tandem capability on this row.

Row 0155 - Percent Total Tandems - Enter the ratio of Analog Stored Program Controlled tandems to total tandems, in percent (row 0154 divided by row 0112).

Row 0160 - ASPC Lines Served - Enter the number of lines served by Analog Stored Program Controlled switches.

Row 0161 - Percent Total Lines - Enter the ratio of lines served by Analog Stored Program Controlled switches to total lines in service, in percent (row 0160 divided by row 0120).

Row 0170 - Total DSPC Switches - Enter the total number of local and tandem Digital Stored Program Controlled switches. Since some switches are used for both local and tandem switching, the sum of rows 172 and 174 may be greater than the amounts entered on this row (see example, row 0110).

Row 0171 - Percent Total Switches - Enter the ratio of Digital Stored Program Controlled switches to total switches, in percent (row 0170 divided by row 0110).

Row 0172 - DSPC Local Switches - Enter the total number of Digital Stored Program Controlled switches used as local switches on this row.

Row 0173 - Percent Local Switches - Enter the ratio of Digital Stored Program Controlled local switches to total local switches, in percent (row 0172 divided by 0111).

Row 0174 - DSPC Tandems - Enter the total number of Digital Stored Program Controlled switches with tandem capability on this row.

Row 0175 - Percent Total Tandems - Enter the ratio of Digital Stored Program Controlled tandems to total tandems, in percent (row 0174 divided by row 0112).

Row 0180 - DSPC Lines Served - Enter the number of lines served by Digital Stored Program Controlled switches.

Row 0181 - Percent Total Lines - Enter the ratio of lines served by Digital Stored Program Controlled switches to total lines in service, in percent (row 0180 divided by row 0120).

SWITCHING CAPABILITY:

Row 0190 - Switches Equipped for Equal Access - Enter the number of switching entities equipped for equal access, Feature Group D service.

Row 0191 - Percent Total Switches - Enter the ratio of switches equipped for equal access to total switches, in percent (row 0190 divided by row 0110).

Row 0200 - Access Lines with Equal Access - Enter the number of access lines served by switches equipped for equal access.

Row 0201 - Percent Total Lines - Enter the ratio of lines served by switches equipped for equal access to total lines in service, in percent (row 0200 divided by row 0120).

Row 0210 - Touch-Tone Capable Switches - Enter the number of switches entities equipped for Touch-Tone.

Row 0211 - Percent Total Switches - Enter the ratio of switches equipped for Touch-Tone to total switches, in percent (row 0210 divided by row 0110).

Row 0220 - Access Lines with Touch-Tone Capability - Enter the number of access lines served by switches equipped for Touch-Tone.

Row 0221 - Percent Total Lines - Enter the ratio of access lines served by switches equipped for Touch-Tone to total access lines, in percent (row 0220 divided by row 0120).

Row 0230 - Total Switches Equipped with SS7-394 - Enter the total number of local and tandem switches equipped with SS7-394.

Row 0231 - Percent Total Switches - Enter the ratio of switches equipped with SS7-394 to total switches, in percent (row 0230 divided by row 0110).

Row 0232 - Lines with Access to SS7-394 - Enter the number of lines in service that are served by switches equipped with SS7-394.

Row 0233 - Percent Total Access Lines - Enter the ratio of lines with access to SS7-394 to total access lines, in percent (row 0232 divided by row 0120).

Row 0234 - Total Switches Equipped with SS7-317 - Enter the total number of switches equipped with SS7-317 on this row.

Row 0235 - Percent Total Switches - Enter the ratio of switches equipped with SS7-317 to total switches, in percent (row 0234 divided by row 0110).

Row 0236 - Lines with Access To SS7-317 - Enter the number of lines in service with access to SS7-317.

Row 0237 - Percent Total Access Lines - Enter the ratio of access lines with access to SS7-317 to total access lines, in percent (row 0236 divided by row 0120).

Row 0240 - Local Switches Equipped with SS7-394 - Enter the number of switches used as local switches that are equipped with SS7-394.

Row 0241 - Percent Total Local Switches - Enter the ratio of local switches equipped with SS7-394 to total local switches, in percent (row 0240 divided by row 0111).

Row 0244 - Local Switches with SS7-317 - Enter the total number of local switches equipped with SS7-317.

Row 0245 - Percent Total Local Switches - Enter the ratio of local switches equipped with SS7-317 to total local switches, in percent (row 0244 divided by row 0111).

Row 0250 - Tandems Equipped with SS7-394 - Enter the total number of switches with tandem capability that are equipped with SS7-394.

Row 0251 - Percent Total Tandems - Enter the ratio of tandem switches equipped with SS7-394 to total tandems, in percent (row 0250 divided by row 0112).

Row 0254 - Tandems Equipped with SS7-317 - Enter the total number of switches with tandem capability that are equipped with SS7-317.

Row 0255 - Percent Total Tandems - Enter the ratio of tandem switches equipped with SS7-317 to total tandems, in percent (row 0254 divided by row 0112).

Row 0270 - Total Switches Equipped with ISDN - Enter the total number of local and tandem switches that are are equipped with ISDN. Since some switches are used for both local and tandem switching, the sum of rows 0280 and 0290 may be greater than the amounts entered on this row (see example, row 0110).

Row 0271 - Percent Total Switches - Enter the ratio of switches equipped with ISDN to total switches, in percent (row 0270 divided by row 0110).

Row 0280 - Local Switches Equipped with ISDN - Enter the number of switches used as local switches that are equipped with ISDN.

Row 0281 - Percent Total Local Switches - Enter the ratio of local switches equipped with ISDN to total local switches, in percent (row 0280 divided by row 0111).

Row 0290 - Tandems Equipped with ISDN - Enter the number of switches with tandem capability on this row.

Row 0291 - Percent Total Tandems - Enter the ratio of tandems equipped with ISDN to total tandems, in percent (row 0290 divided by row 0112).

Row 0300 - Lines with Potential Access to ISDN - Enter the number of lines served by switches equipped with ISDN.

Row 0301 - Percent Total Lines - Enter the ratio of lines in service with access to ISDN to total lines in service, in percent (row 0280 divided by row 0120).

Row 0311 - Basic Rate ISDN (BRI) Interfaces Equipped - Basic rate ISDN consists of two Bearer Channels at 64 Kilobits/second and one Delta Channel at 16 Kilobits/second. Quantities reflected are the number of (2B+D) BRI interfaces equipped. This amount represents actual interfaces equipped with ISDN.

Row 0312 - Primary Rate ISDN (PRI) Interfaces Equipped - Equivalent primary rate ISDN interfaces are generally configured as 23 Bearer Channels and one Delta Channel, all at 64 Kilobits/second. Quantities reflected are the number of equivalent PRI (23B+D) ISDN interfaces equipped, excluding interoffice PRI ISDN interfaces. This amount represents actual interfaces equipped with ISDN.

Table II

Row 0320 - Total Sheath Kilometers - Sheath kilometers include loop, interoffice and toll sheath kilometers.

Row 0321 - Copper - Enter the number of sheath kilometers of twisted pair copper cable on this row.

Row 0322 - Fiber - Enter the number of sheath kilometers of fiber on this row.

Row 0323 - Other - Enter the number of sheath kilometers of aluminum, coaxial, and all other sheath kilometers not included in rows 0321 or 0322, on this row.

Row 0330 - Total Circuit Links - A circuit link is that link that exists between points A and B where voice frequency/DSO cross-connects and/or analog/digital conversion (collectively referenced here as conversion) occurs. Circuit links are counted as follows: If there is a circuit between A and B with no intermediate conversions, count one circuit link for each voice frequency equivalent channel. If there is a circuit between A and B with one intermediate conversion, count two circuit links for each voice frequency equivalent channel. Similarly, two intermediate conversions between A and B would result in three circuit links per voice equivalent channel.

Row 0331 - Baseband - Enter the number of baseband circuit links on this row.

Row 0332 - Analog CXR - Enter the number of analog CXR circuit links, converted to voice frequency equivalents, on this row.

Row 0333 - Digital CXR - Enter the number of digital CXR circuit links, converted to voice grade equivalents, on this row.

Carrier Links - A Carrier Technology Segment (carrier link) is defined as a segment of the interoffice network disaggregated by technology (i.e., copper, fiber or radio). Each segment between central offices or other interoffice network nodes is defined as a unique carrier technology segment. For these purposes, a central office is an inter-office network node. Other interoffice network nodes are defined as any points in the interoffice network where a cross-connect occurs, or where a change in technology or medium occurs. Counts are on an analog group or DS1 equivalent basis.

Row 0350 - Analog Carrier Links - Enter the number of analog carrier links on this row.

Row 0351 - Copper - Enter the number of copper analog carrier links on this row.

Row 0352 - Radio - Enter the number of radio analog carrier links on this row.

Row 0360 - Digital Carrier Links - Enter the number of digital carrier links on this row.

Row 0361 - Copper - Enter the number of copper digital carrier links on this row.

Row 0362 - Radio - Enter the number of radio digital carrier links on this row.

Row 0363 - Fiber - Enter the number of fiber digital carrier links on this row.

LOOP PLANT - CENTRAL OFFICE TERMINATIONS - These facilities are from the central office to the end users. Local loop includes analog type services only. It excludes ISDN.

Row 0370 - Total Working Channels - Working channels are on a 4 kHz bandwidth (single voice channel) basis. Working channels originating from a remote switch are treated the same as if the channels originated in the host central office. All reports of working channels are counted on this 4 kHz basis for purposes of this report. This amount equals the sum of rows 0360, 0370 and 0380.

Row 0380 - Total Copper - Enter the number of copper working channels on this row. This amount equals the sum of rows 0381, 0382 and 0383.

Row 0381 - Baseband - Enter the number of baseband copper working channels on this row.

Row 0382 - Analog - Enter the number of analog copper working channels, converted to voice frequency equivalents, on this row.

Row 0383 - Digital - Enter the number of digital copper working channels, converted to voice frequency equivalents, on this row.

Row 0390 - Fiber Digital CXR - Enter the number of fiber digital CXR working channels, converted to voice frequency equivalents, on this row.

Row 0410 - Other - Enter the number of other working channels on this row. Explain the data entered here in a footnote.

Row 0420 - Total Equipped Channels - Equipped channels are on a 4 kHz bandwidth (single voice channel) basis. Equipped channels originating from a remote switch are treated the same as if the channels originated in the host central office. This amount equals the sum of rows 0430, 0440 and 0460.

Row 430 - Copper - Enter the number of copper equipped channels on this row. This amount equals the sum of rows 0431, 0432 and 0433.

Row 0431 - Baseband - Enter the number of baseband copper equipped channels on this row.

Row 0432 - Analog CXR - Enter the number of analog CXR copper equipped channels on this row.

Row 0433 - Digital CXR - Enter the number of digital CXR copper equipped channels on this row.

Row 0440 - Fiber Digital CXR - Enter the number of fiber digital CXR equipped channels on this row.

Row 0460 - Other - Enter the number of other equipped channels on this row. Explain the data entered here in a footnote.

Row 0470 - Copper Pairs Terminated at the Main Frame (Loop Plant Only) - Enter the number of copper pairs terminated at the main frame.

Row 0480 - Fiber Strands Terminated in the Central Office (Loop Plant Only) - Enter the number of individual fiber strands terminated in central offices on this row.

Row 0481 - Fiber Terminated at Customer's Premises at the DS0 Rate - Enter the number of individual customer services provided over fiber strands terminated at the customer's premises, other than trials, at the DS0 rate on this row.

Row 0482 - Fiber Terminated at Customer's Premises at the DS1 Rate - Enter the number of individual customer services provided over fiber strands terminated at the customer's premises, other than trials, at the DS1 rate on this row.

Row 0483 - Fiber Terminated at Customer's Premises at the DS2 Rate - Enter the number of individual customer services provided over fiber strands terminated at the customer's premises, other than trials, at the DS2 rate on this row.

Row 0484 - Fiber Terminated at Customer's Premises at the DS3 Rate or Higher - Enter the number of individual customer services provided over fiber strands terminated at the customer's premises, other than trials, at the DS3 rate or higher on this row. Footnote the number of individual services provided over fiber strands terminated at the customer's premises at a higher than DS3 rate, if any.

Table III

Row 0510 - Total - Enter the data for the total number of end offices in the appropriate columns on this row.

Row 0511 - End Offices Electro-Mechanical Switches - Enter the data for the total number of end offices equipped with electro-mechanical switches in the appropriate columns on this row.

Row 0512 - End Office SPC Analog Switches - Enter the data for the total number of end offices equipped with SPC analog switches in the appropriate columns on this row.

Row 0513 - End Office Digital Switches - Enter the data for the total number of end offices equipped with Digital Switches in the appropriate columns on this row.

Row 0520 - Total Access Lines - Enter the percent of the network represented by the total number of access lines in the appropriate columns on this row.

Row 0521 - Access Lines Electro-Mechanical Switches - Enter the percent of the network represented by the total number of access lines equipped with electro-mechanical switches in the appropriate columns on this row.

Row 0522 - Access Lines SPC Analog Switches - Enter the percent of the network represented by the total number of access lines equipped with SPC analog switches in the appropriate columns on this row.

Row 0523 - Access lines Digital Switches - Enter the percent of the network represented by the total number of access lines equipped with Digital Switches in the appropriate columns on this row.

Table IV

Row 0530 - Total Access Lines in Service - Enter the number of all access lines in service on this row.

Row 0531 - Access Line Gain - This amount is calculated by subtracting outward movement from inward movement.

Row 0540 - Total Gross Capital Expenditures - Enter the dollar amount of gross additions to accounts 2110, 2210, 2220, 2230, 2310, 2410, 2680 and 2690 during the current reporting period. See also ARMIS Report 43-02, Row 260, Column (ac). Gross capital expenditures are consistent with Form M and ARMIS.

Infrastructure Report

Column Descriptions

Table I

Column (a) - Total Study Area - This column represents the total study area. A study area usually consists of a telephone company's service territory in a given state, although telephone companies occasionally have more than one study area in a particular state. Enter the facilities in the total study area in this column. This amount should equal column (b) plus column (c).

Column (b) - within MSA - This column represents all MSAs served within the study area. MSAs, or Metropolitan Statistical Areas, are designated by the Department of Commerce in a list following each decadal census. An MSA includes at least one city with a minimum population of 50,000 and its surrounding area, or a Census Bureau defined urbanized area of at least 50,000 population located in an area with a minimum population of 100,000. See, 45 Fed. Reg. 956 (1980). This definition and the current list remain in effect until the new list of metropolitan statistical areas and changes in definition, if any, are issued in June 1992. Enter the facilities within any MSA in the Study Area in this column.

Column (c) - non-MSA - This column represents all areas which lie outside of any MSA. Enter the facilities in the Study Area which are located outside of any MSA.

Table II

Column (d) - Total Study Area - See description for Table I, column (a).

Table III

Call Set-Up Time - For the purposes of infrastructure reporting, call set-up time is defined as "the interval that begins when the caller completes dialing...and ends when the LEC has delivered the call to the (interexchange carrier's) point of presence".

Column (e) - End Offices - Enter the total number of end offices appropriate for each row, in this column. The access line counts in this column should be consistent with the access line data provided in Table I of the Infrastructure Report. Footnote the number of end offices used in the Bellcore studies that developed the underlying data.

Average Call Set-Up Time - Average call set-up time is the average amount of call set-up time for all end office types.

Direct - Direct access from the end office to the interexchange carrier POP.

Column (f) - SS7-394 - Enter the average call set-up time, or the percent of network represented, as appropriate, for direct access from end offices using SS7-394.

Column (g) - MF - Enter average call set-up time, or the percent of the network represented, as appropriate, for direct access from end offices using multifrequency signaling.

Via Access Tandem - End Offices routing calls through a switch having tandem capability.

Column (h) - SS7-394 - Enter the average call set-up time, or the percent of the network represented, as appropriate, for end offices routing calls through tandem switches using SS7-394.

Column (i) - MF - Enter the average call set-up time, or percent of the network represented, as appropriate, for end offices routing calls through tandem switches using multifrequency signaling.

Column (j) - Mixed - Enter the average call set-up time, or percent of the network represented, as appropriate, for end offices using multifrequency signaling, routing calls through an access tandem switch using SS7-394 signaling.

Table IV

Column (k) - Total Study Area - See description for Table I, column (a).

CERTIFICATION

I certify that I am an officer of _____; that I have examined the foregoing report and that to the best of my knowledge, information, and belief, all statements of fact contained in this report are true and that said report is an accurate statement of the affairs of the above named respondent in respect to the data set forth herein for the period from _____ to _____.

PRINTED NAME _____

POSITION _____

SIGNATURE _____

DATE _____

(Persons making willful false statements in this report form can be punished by fine or imprisonment under the Communications Act, 47 U.S.C. 220(e).)

CONTACT PERSON _____

TELEPHONE NUMBER _____

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 91-114
38144

In the Matter of	)	
	)	
Evaluation of the Syndication and Financial Interest Rules	)	MM Docket No. 90-162

Report and Order

By the Commission: Chairman Sikes dissenting and issuing a separate statement; Commissioner Quello dissenting to the overall result, concurring in part and issuing a separate statement; Commissioners Marshall, Barrett, and Duggan issuing separate statements.

Adopted: April 9, 1991 Released: May 29, 1991

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Appendices

Appendix A -- List of Commenters

Appendix B -- Rules

I. INTRODUCTION

1. This Report and Order reflects the Commission's thorough consideration of its programming diversity mandate in the video marketplace of the 1990s. The Commission has studied, in particular, the continued efficacy of restraints on television network acquisition and syndication of programming in an age when new programming outlets seem to abound and yet the broadcast networks uniquely remain, both for viewers and producers, the outlets of choice.

2. Accordingly, by this Report and Order, (or this "Order") the Commission amends its financial interest and syndication rules.[1] Among other things, the new rules will: (1) delete restrictions on network ownership and syndication of network programming as to all dayparts and all programs other than prime time entertainment programming; (2) allow networks to retain all rights in all "in-house" productions; (3) permit networks to fill up to, but not more than, 40 percent of their prime time entertainment schedule with "in-house" productions; (4) allow networks to acquire all rights, including financial interests, domestic syndication rights and foreign syndication rights, in outside productions, subject to certain safeguards; (5) allow networks to engage in foreign syndication without limitation; and (6) allow limited network participation in first-run syndication. The Report and Order also adopts a new definition of "network" and imposes certain reporting requirements.

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[1] 47 C.F.R. § 73.658(j).

II. BACKGROUND

3. The financial interest and syndication rules, adopted in 1970, impose constraints upon the financing, development and broadcast syndication of television programs by television networks.[2] Specifically, the current rules prohibit television networks from acquiring any financial interests in the subsequent broadcast of outside produced programs (i.e., programs not solely produced by the network) other than the right to exhibit such programs on the network. The current rules also prohibit networks from actively engaging in the domestic syndication business, or from having any ongoing interest in the syndication of programs for non-network broadcast distribution. Networks are allowed, however, to syndicate outside the United States programs that they have solely produced or that have been produced by foreign entities.

4. The Commission originally adopted these rules to promote diversity of programming sources and distributors by curbing the excessive power of the three major broadcast networks in the financing, development and syndication of television programming. In so doing, the Commission noted the inherent structural advantages of the networks:

> The networks obviously have a tremendous and, we believe, insurmountable advantage in providing programs for their affiliates. Not only is there the natural tendency of an affiliate to do more business with its dominant supplier, but the program distribution process is much simpler via a network . . .[3]

5. Furthermore, the Commission found that the rules would promote a "freer, more diversified television production and distribution process" and a

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[2] The current financial interest and syndication rules (also referred to as "current rules" or the "rules") define "network" to be "any person, entity, or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states." 47 C.F.R. § 73.658 (j)(4). At present, the broadcast companies meeting this definition are CBS Inc. (CBS), National Broadcasting Company, Inc. (NBC), Capital Cities/ABC, Inc. (ABC) and Fox Broadcasting Corporation (Fox). In May 1990, however, Fox was granted a waiver which has temporarily exempted it from the current rules pending completion of this proceeding. Fox Broadcasting Company, 5 FCC Rcd 3211 (1990). This waiver was subsequently extended until the effective date of the rule changes adopted in the Report and Order. Order, FCC 91-149, released May 7, 1991. Accordingly, as used in this Order, the term "network" (or "networks") will generally refer to the three traditional networks, ABC, CBS and NBC.

[3] Amendment of Part 73 of the Commission's Rules, 23 FCC 2d 382, 386 (1970) (1970 Order), aff'd sub nom. Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).

"[d]iversity of programs and development of diverse and antagonistic sources of program service" by preventing potential anticompetitive abuses by the television networks.[4] Specifically, the rules were intended to serve the following public interest goals: (1) increase diversity and competition in program supply for the public's network television viewing; and (2) create a diverse and competitive syndication marketplace for the benefit of local stations and their viewers.[5] In this way, the Commission determined, "we may more nearly achieve the goal described by Judge Learned Hand in 1942, and echoed by Justice White in 1969, of a television broadcast structure which is served 'by the widest practicable variety' of choice of programs available for broadcasting."[6]

6. The United States Court of Appeals for the Second Circuit has held that the financial interest rule was a reasonable exercise of the Commission's discretion and that the syndication rule "is supported by the evidence and is 'reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.'"[7]

7. Changes in the industry over the last twenty years have raised the question of whether modification of our financial interest and syndication rules is warranted or whether the rules are still needed to promote broadcast program diversity. Accordingly, on March 14, 1990, in response to a petition by Fox Broadcasting Corporation (Fox),[8] the Commission initiated this proceeding by issuing a Notice of Proposed Rulemaking[9] seeking comment on five basic proposals to modify the financial interest and syndication rules: (1) retain the existing rules intact; (2) eliminate the financial interest rule but retain the syndication rule intact; (3) eliminate the financial interest rule and modify the syndication rule as proposed in the Tentative Decision in BC Docket 82-345;[10] (4) eliminate the financial interest rule and modify the

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4 Id. at 387, 400.

5 Id. at 394-5.

6 Id. at 400 (citations omitted).

7 Mt. Mansfield Television, Inc. v. FCC, 442 F.2d at 486, 487, citing United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1969).

8 Fox filed a "Petition for Resumption of Rulemaking and Request for Temporary Relief" on January 29, 1990 asking that the Commission modify the financial interest and syndication rules.

9 5 FCC Rcd 1815 (1990).

10 Prior to the commencement of the present proceeding, the rule had been under review in Docket 82-345. This review commenced with the Notice of Inquiry in Docket 21049, 62 FCC 2d 548 (1977) and Further Notice of Inquiry in Docket 21049, 69 FCC 2d 1524 (1977). In 1980, a staff report based on that docket and independent investigation was released. Final Report of Network Inquiry Special Staff (October 1980). Following up on this staff work, the

syndication rule to permit networks to syndicate a certain number or percentage of programs or to participate in a share of the profits of programs syndicated by others; and (5) retain the existing rules but add an exception for emerging networks by revising the definition of "network" set forth in 47 CFR § 73.658(j)(4). Commenters were also urged to submit alternative proposals for potentially relaxing the current rules. In response, parties offered a number of such proposals, including in-house production and separated negotiations proposals, variations of which we have adopted herein.

8. On October 22, 1990, the Commission adopted a Further Notice of Proposed Rulemaking[11] soliciting comments on several specific proposals developed in response to the first notice of proposed rulemaking. These proposals encompassed a number of modifications to the financial interest and syndication rules, including adopting certain safeguards (such as producer-initiated or separated negotiations) and narrowing the prohibition against network participation in foreign and domestic syndication. The Commission also asked commenters to address questions regarding "percentage of schedule caps" and the definition of "in-house" productions. In addition, in an effort better to assess the merits of the proposals, the Commission held an en banc hearing on December 14, 1990 to receive oral testimony from interested parties.

9. By Commission Order of March 15, 1991,[12] further comment was requested on two comprehensive alternative rule change proposals. Among other things, the Commission sought comment on in-house and option term limits, as well as proposed changes to the definition of a "network" and accompanying transitional rules.[13]

10. After reviewing the totality of the record, the Commission finds that there is a strong public interest in maintaining diverse sources of network programming as well as diverse sources of off-network programming to local independent broadcast stations. The Commission also finds that there is a strong public interest in maintaining diverse, competitive sources of first-run programming to local independent and affiliate broadcast stations. We have balanced these public interests against the public interest in providing

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Commission issued a Notice of Proposed Rule Making in Docket 82-345, 47 Fed. Reg. 32,959 (1982), and in 1983, the Commission issued a Tentative Decision and Request for Further Comments in Docket 82-345, 94 FCC 2d 1019 (1983) (Tentative Decision). Seven years later, that long-suspended docket was terminated, Order in Docket 82-345, and the current proceeding was commenced.

11 5 FCC Rcd 6463 (1990).

12 56 Fed. Reg. 11720 (March 20, 1991).

13 On April 8, 1991, the Coalition to Preserve the Financial Interest and Syndication Rule (Coalition) requested a waiver of the ex parte rules (47 C.F.R. Section 1.1203) and consideration of a request for an additional comment period. Although the Commission waived the ex parte rules and considered the Coalition's request, it declined to reopen the comment period in light of the unusually full opportunity already provided for comment.

existing and emerging broadcast networks the opportunity and flexibility to compete in and thus generate additional revenue from the domestic and international video marketplace. Therefore, by this Order, we adopt rules which will enhance the ability of existing and emerging networks to compete effectively in, but not unfairly dominate, today's video marketplace.

III. SUMMARY

11. In our review of the voluminous record before us, the Commission has been confronted by alternative views of the television programming world so starkly and fundamentally at odds with each other that they virtually defy reconciliation. As set forth below, the Commission has analyzed the various views advanced by the commenters and formed an understanding of the programming world based on the realities of the marketplace and the interests of those who compete in it. As a result of that analysis, and our own experience and expertise, we have modified and significantly relaxed the financial interest and syndication rules, while retaining certain narrow safeguards. Because we recognize that the television marketplace is in flux, we are requiring another review of the rules commencing four years after the effective date of this Order.

12. In the course of the Commission's deliberations, there has been little disagreement that the video marketplace has changed since the rules were first adopted in 1970. The three major networks have lost a proportion of the total television audience; a flourishing cable industry has emerged; and the fundamental objectives the Commission sought to advance when it promulgated the rules -- to foster a robust syndication industry and to prevent network extraction of rights from non-network producers -- largely have been achieved.

13. Sharp disagreement has emerged, however, about whether these changes warrant retention, modification or repeal of the rules. The debate has turned on several key questions, among them:

-- Have changes in the video marketplace since the rules were put into effect been so sweeping and decisive as to render unnecessary Commission regulations aimed at promoting diversity of program sources?

-- Should the Commission continue to be concerned about the danger that television networks, with their unique access to a truly national audience, might misuse their power in the programming marketplace? That they might be able, for example, to condition access to their program schedules not on quality and audience appeal, but on the extraction of valuable rights and interests from program producers?

-- Have changes in the video marketplace over the past two decades created genuine alternatives for television program producers -- new outlets, beyond the networks, in which "syndication value" can be created? Or do the networks remain essentially the only place where such value can be created?

14. An "unimpeded marketplace" and "unimpeded competition," it must be pointed out, are not the chief or only concerns of this Commission.[14] The Commission's historic interest in diversity -- in a wide range of voices and a wide variety of cultural influences -- is very much at stake in this proceeding. Again and again in recent years the Commission has given priority to that diversity interest in ways that have led to accusations that efficiency or competition were impeded. The Commission's rules limiting the number of broadcast stations that can be held by one owner,[15] for example, are designed to encourage a diversity of voices, though these rules, arguably, may prevent owners from achieving economies of scope and scale. The Commission's minority preference policies -- recently affirmed by the Supreme Court[16] -- are another example where the Commission can, and sometimes will, consider diversity a value to be nurtured and defended.

15. Now, based on the extensive record before it and its own determination of the overall public interest, the Commission comes to a significant judgment: that it should substantially modify the financial interest and syndication rules. The record, in our judgment, does not provide an adequate case for total repeal. Instead, it supports granting considerable relief to the networks, with structural and behavioral safeguards to prevent or mitigate potential abuses affecting independent producers, program distributors, and local broadcasters who are parties to this proceeding -- the very parties responsible for the diversity we seek to preserve.

16. Thus, this decision represents a measured and calculated response which deregulates the financial interest and syndication rules in substantial respects while retaining certain limited safeguards. Our decision also creates a mechanism for carefully monitoring the program marketplace so as to form the basis for any future modification of the rules.

17. In particular, by this Report and Order, we take the following actions to enhance the ability of existing and emerging networks to compete effectively in today's video marketplace, but not dominate it unfairly.

- The financial interest and syndication rules will no longer be applied to non-entertainment programming (e.g., news and sports) in prime time, nor to any network programming outside of prime time. These rules, as modified, will continue to govern production, acquisition and

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14 Cf. National Broadcasting Company v. U.S., 319 U.S. 190, 223-24 (1942). The Department of Justice, one of the government agencies charged with enforcing federal antitrust laws, also has recognized that the Commission's public interest mandate is broader than simply protecting the video marketplace from potential anticompetitive abuses by the networks. See para. 47 and note 59, infra.

15 47 C.F.R. Section 73.3555.

16 Metro Broadcasting v. FCC, 110 S. Ct. 2997 (1990).

syndication of network prime time entertainment programs and network participation in first-run syndication.

- A network may acquire financial interests, domestic syndication rights and foreign syndication rights in any outside productions aired on its prime time entertainment schedule, provided that (1) such rights are purchased pursuant to separate negotiations initiated no less than 30 days after execution of the network license fee agreement (and, where applicable, a pilot production agreement); and (2) the network certifies that access to its schedule was not conditioned on the acquisition of such rights.

- A network may produce up to 40 percent of its prime time entertainment schedule "in-house" (i.e., "solely produced" or "co-produced" by the network, as defined herein), and it may retain financial interests and active syndication rights, both domestic and foreign, in those productions. Co-production arrangements between the network and a domestic producer may be initiated only by the outside producer, who shall be provided a 30-day cooling-off period before the arrangement becomes binding.

- Networks may not favor their affiliates nor unduly delay the syndication of those "in-house" productions they actively distribute in the domestic marketplace.

- A network may produce in-house an unlimited amount of prime time entertainment programming for airing or distribution on other broadcast networks or other broadcast outlets, and it may retain financial interests and foreign and domestic syndication rights in such programs. However, these programs may be syndicated domestically only through an independent syndicator subject to safeguards.

- Networks shall be allowed to engage in foreign distribution of programming free of any distribution safeguards.

- A network may produce first-run programming and retain financial interests and foreign syndication rights in such programming "solely produced" in-house, but may domestically distribute such programming only through an independent syndicator subject to safeguards. A network may not acquire any financial interests or syndication rights from outside producers of domestic first-run syndication programming.

- For purposes of these rules, a network will be defined as any entity providing more than 15 hours per week of prime time programming on a regular basis to interconnected affiliates that reach, in aggregate, at least 75 percent of television households nationwide.

- A new network's program ownership rights obtained prior to becoming a "network" shall be "grandfathered." A new network and its affiliates will have a transition period of 36 months to bring pre-existing contracts into compliance with the prime time access rule. A new

network otherwise shall be required to comply immediately with the new rules.

- A network must maintain semi-annual reports in its owned and operated stations' public files. These reports must include network certification of its compliance with the instant rules and other specific information regarding prime time entertainment programs which it has produced or aired or in which it holds financial interests or syndication rights.

- These rules shall be reviewed by the Commission four years from their effective date.

18. In sum, we have carefully tailored and calibrated these residual remaining financial interest and syndication rules to protect and promote the public interest in diversity and competition in the current video marketplace. While other options we considered may have been simpler or more expedient -- simple retention or simple repeal of the rules, for example, or even repeal of the rules as to a portion of the network prime time schedule -- our considered judgment is that none of these alternatives is fully supported by the complex and discordant record compiled in this proceeding. We strongly believe, moreover, that prudent, balanced and incremental action in this proceeding will better serve the public interest and pose less danger to the Commission's traditional diversity and competition concerns than convulsive regulatory change in the television marketplace. It is in the interest of granting more flexibility to the networks while preserving programming diversity and competition, therefore, that we are substantially relaxing our rules subject to the structural and behavioral safeguards described below.

IV. LIMITATION OF RULES TO PRIME TIME ENTERTAINMENT PROGRAMMING

19. As an initial matter, we note that the financial interest and syndication rules adopted in 1970 apply to all programming on the network. In our March 15, 1991 Order Requesting Further Comment in this proceeding, we sought comment on applying any rules that might be retained only to prime time programs.[17]

20. As discussed throughout this Order, the Commission adopted the financial interest and syndication rules in order to promote diversity in television programming and to prevent the networks from engaging in anticompetitive activities with respect to programs for which a potentially significant syndication market exists. The record reveals that such programming today primarily includes network prime time entertainment and

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17 Order Requesting Further Comment (released March 15, 1991) at Proposal I, p.1, Proposal II, p.2. We also proposed limiting the application of residual rules to prime time entertainment series programs in our 1983 Tentative Decision. 94 FCC 2d at 1023.

first-run syndicated programming. In fact, those commenters who expressed opposition to eliminating our rules were most concerned about the effect on diversity and competition in these categories of programs.[18]

21. Accordingly, we will apply the new rules adopted in this Order only to prime time network entertainment programming and first-run syndicated programming.[19] All other portions of the network schedule, i.e., non-entertainment programming in prime time (such as news and sports) and all network programming outside of prime time, will be freed from any residual financial interest and syndication rules. For purposes of our new rules, a "prime time program" shall be one that has network exhibition during the hours of 7 p.m. to 11 p.m. eastern time and pacific time, or 6 p.m. to 10 p.m. central time and mountain time.

V. FINANCIAL INTEREST RULE

22. The financial interest rule was promulgated at a time when the three traditional networks collectively possessed virtual total control over the purchase of prime time entertainment television programming. Noting that "the facts which propel us to action are relatively simple and, we believe, quite compelling," the Commission in 1970 described a market in which sale to the networks was the only viable option for a producer desiring a television outlet for a program.[20] Finding that the absence of alternative programming outlets to the networks was an "unhealthy situation," the Commission concluded that "the public interest requires limitation on network control and increase in the development of truly independent sources of prime time programming."[21]

23. The Commission accordingly imposed the financial interest rule "to lessen the bargaining leverage provided by network control of program exhibition," and "to remove the possibility that acquisition of financial interests becomes a prerequisite to acceptance of a program for network exhibition."[22] Thus, the Commission sought to prevent the networks from using their dominant position in the market to "extract" financial rights in programs

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[18] See, e.g., Coalition Comments of June 14, 1990 at 29; Coalition Further Comments of November 21, 1990 at 3; INTV Comments of June 14, 1990 at 43; Program Producers and Distributors Committee (PPDC) Comments of November 21, 1990 at 5.

[19] As discussed in Section VIII below, we find that the unique character of first-run syndication requires retention of certain limits on network participation in that marketplace. The residual rules will thus continue to apply to first-run syndicated programming aired in all dayparts.

[20] 1970 Order, 23 FCC 2d at 385.

[21] Id. at 394.

[22] Id. at 397.

produced by others as a condition of airing the program. It also sought to eliminate what it found was a potential conflict of interest in which networks could make their programming decisions so as to favor programs in which they hold financial interests.[23]

24. As discussed below, the record in this proceeding reveals a video marketplace substantially different from the one the Commission reviewed in 1970. This record demonstrates that the networks no longer enjoy the near total dominance that characterized their competitive position 20 years ago. Indeed, because the record indicates that the public would benefit if the networks had increased opportunities in the acquisition of program rights, we have decided to relax significantly the current financial interest restrictions.

25. At the same time, however, the record does not support the assertion that the role and power of the networks has so diminished that the Commission need no longer fear the adverse consequences that would ensue from their unbridled ability to obtain financial interests in outside productions. Indeed, we find that the concerns that spurred the Commission to adopt the financial interest rule -- in particular, the networks' ability to extract rights from and condition the access of program producers to network schedules -- continue to exist today despite the changes in the video marketplace since 1970. We further conclude that such extraction and conditioning, if allowed to occur, would disserve the viewing public by reducing the opportunity for diverse sources of prime time entertainment programming to develop and thrive. Accordingly, while we will now permit the networks to obtain financial interests in network programming, we will require them to do so pursuant to prudent safeguards aimed at preventing extraction and conditioning of access to network prime time schedules.

Comments

26. Commenting production interests, including the Coalition to

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[23] Specifically, the Commission reasoned that, because producers facing network extraction and conditioning of access would lose needed revenues, such network abuses could force outside producers out of the marketplace and discourage investment in independent programming. The health and vitality of the independent production community -- and a diversified network schedule -- would be jeopardized accordingly. Id. at 398.

The 1970 Order also imposed the syndication rule, discussed below, which prevents the networks from actively syndicating television programming in domestic and foreign markets. This rule is discussed in detail in Section VII, infra. Finally, the 1970 Order adopted the "prime time access rule," not at issue here, which opened access to network prime time for independent program suppliers by limiting the amount of "network controlled" programming that could be aired between 7 p.m. and 11 p.m. The prime time access rule is set forth in Section 73.658(k) of our rules. 47 C.F.R. Section 73.658(k).

Preserve the Financial Interest and Syndication Rule (Coalition),[24] the Program Producers and Distributors Committee (PPDC) and the Writers Guild of America, West, believe that the rules still are needed to prevent the networks from dominating the program supply market. They state that the rules were intended to counteract market power that the networks derive from the Commission's allocation scheme, to foster greater diversity of program sources, and to encourage risk-taking by independent producers.

27. These parties assert that, while the video marketplace has changed since 1970, none of the changes has significantly diminished the power of the networks, particularly in prime time. They claim that the networks possess monopsony power because they remain the only buyers of a steady stream of high cost, quality prime time entertainment programming that reaches virtually all homes. Thus, these commenters contend, if a network were permitted to acquire financial interests, purchase of a program for network exhibition could be conditioned on the network's also obtaining a financial interest as well as further interests, such as domestic and foreign syndication rights.

28. The Department of Commerce/National Telecommunications and Information Administration (DOC) argues that the market for video programming has changed greatly in the 20 years since the rules were adopted. It states that the three traditional broadcast networks face a much greater degree of competition for viewers and for programming than they did when the rules were adopted. Accordingly, in DOC's view, the restrictions imposed on the networks are overbroad and unnecessarily restrictive in today's marketplace. However, DOC also maintains that the record is not conclusive on the question of whether the networks -- which "continue to play a critical, uniquely important role in the delivery of television programming to the American public"[25] -- are without any continuing market leverage over independent producers or independent television stations. In light of the networks' unique continuing role, as well as the difficulty of subsequently correcting any damage that might occur through premature elimination of the rules, DOC proposes that relaxation of the rule be linked to certain safeguards. In particular, DOC proposes that elimination of the financial interest rule be made subject to (1) a requirement that network negotiations to acquire such interests be conducted subsequent to both agreement on network exhibition rights and the network's scheduling of the program; and (2) a general prohibition against network discrimination against programming in which it holds no financial interests.

29. On the other hand, the networks, the Department of Justice (DOJ) and the staff of the Federal Trade Commission (FTC) argue that the anticompetitive concerns that led to the adoption of the rules in 1970 no longer exist. They assert that the networks do not possess monopsony power with respect to the purchase of television programming because they must compete with each other, the Fox network and other video distributors, in

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[24] The members of the Coalition include over 200 production companies, studios, program distributors, independent television stations, industry associations, labor and consumer organizations and public interest groups.

[25] DOC Further Comments of November 21, 1990 at 3.

particular the cable industry. The networks further note the growth of video outlets since the rules were adopted has altered their competitive position. These commenters also assert that the rules prevent networks from taking advantage of the economies of scope and scale that can be achieved through vertical integration.

30. The FTC and the networks also assert that the rules prevent the networks from engaging in risk-sharing arrangements commonly used to finance television productions. In particular, the networks state that the rules have reduced the incentives for them to invest in riskier ventures that are likely to produce more attractive and competitive programming. They claim that an increase in such programming would benefit the public and create a stronger, more competitive free over-the-air television system.

31. The Coalition responds that the rules do not unduly restrict the networks' ability to integrate vertically in other areas. It notes that the networks can enter virtually all aspects of the entertainment business and, in fact, have engaged in a wide variety of areas including station ownership, cable networks, home video distribution, theatrical motion pictures, records and print media. They also contend that elimination of the rules would result in a less competitive and diverse marketplace, with the networks controlling the entire program production and distribution process from development through domestic and foreign syndication. In addition, these commenters respond to the networks' argument that the rules prevent efficient risk sharing by observing that the independent producers who allegedly would benefit from a change in the rules vehemently object to the networks' position, convinced that network "help" would turn into network extraction of rights.

Discussion

32. Our longstanding concern with program diversity remains as central today as it was in 1970 when the Commission established the financial interest rule.[26] In this proceeding, our evaluation of the record, and our own experience and expertise, lead us to conclude that diversity can best be achieved in the increasingly competitive television market of the 1990's through substantial, but not complete, relaxation of the financial interest rule. Therefore, we have decided to eliminate the current restriction on network acquisition of financial interests in prime time entertainment programming (i.e., program series, made-for-television movies, mini-series and entertainment specials) acquired from outside producers.[27] To attain financial interests in prime time entertainment programming, however, the networks will be permitted to negotiate for such rights only 30 days or more after they have concluded a license fee agreement with the outside producer. This significant deregulatory step will increase opportunities for network financing of

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[26] See, e.g., Associated Press v. U.S., 326 U.S. 1 (1945); Metro Broadcasting v. FCC, 110 S. Ct. 2997 (1990).

[27] As discussed in Section VI, infra, we also have decided to allow networks to hold financial interests in a more broadly defined class of "in-house" productions.

programming and thus further the public interest in program diversity. In addition, the 30-day safeguard will help ensure that network dominance over the acquisition of prime time entertainment programming does not reduce diversity by allowing networks to extract financial interests from outside producers.

33. As noted above, the Commission adopted the financial interest rule to promote a more "diversified" television production process by preventing networks from extracting ownership rights from unwilling producers and conditioning access to the network schedule on the acquisition of such rights.[28] Although the financial interest rule has succeeded in precluding these potential network abuses, we are sympathetic to network arguments that the current rule disserves the public interest in diversity by limiting the funding of new, outside programming.[29] Lifting the restriction will allow program producers to seek financing of their production "deficits"[30] from the network carrying their programs -- and should thereby introduce new competition into the bidding for financial interests among the production studios, independent syndicators and other financiers of program production.[31] Lifting the restriction could also increase overall investment in prime time entertainment programs, or at least increase a network's willingness to invest in particularly risky programming.

34. Of course, one potentially undesirable way that a network could reduce the riskiness of outside production would be to operate its network schedule so as to favor those programs in which the networks holds financial interests. Indeed, it was partly out of concern for this conflict of interest that the Commission originally adopted the financial interest rule.

35. We do not proceed to modify our financial interest rule without some trepidation that a network would indeed consider its equity interest in choosing between two otherwise equally attractive programs. On balance, however, we are willing to bear this risk for fear of the consequences of continuing to deny networks <u>any</u> opportunity to acquire a financial interest in outside productions. Moreover, as explained below, we have expressly premised

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28 <u>See</u> discussion at paras. 22-23, <u>supra</u>.

29 <u>See</u> Joint Network Comments of June 14, 1990, Volume II at 89-90 and 94-96.

30 The Coalition asserts that increased production deficits have resulted from the growing difference between network license fees and production costs, and that the producers' main opportunity to recoup these deficits and to generate any profits on their programs is through domestic and foreign syndication. Coalition Comments of June 14, 1990 at 20-23.

31 We would expect elimination of the financial interest rule not to increase significantly the number of financially independent producers, as the networks suggest, as much as it would substitute (at least in part) the networks for studios or independent syndicators as financiers of outside productions. <u>Compare</u> Joint Network Comments of June 14, 1990, Volume II at 71 and 82-96 <u>with</u> Coalition Comments of August 1, 1990 at 60-62.

network acquisition of ownership rights in outside productions on network certification that such rights have not been obtained as a condition of network licensing or airing of the program.[32]

36. We believe that relaxation of the financial interest rule is also supported by the fact that the networks now face much stronger competition for viewers and programming than when the financial interest rule was adopted:

-- The number of independent television stations has increased from 65 in 1970 to some 340 in 1990, 130 of which obtain a significant portion of their programming from an emerging broadcast network (the Fox Broadcasting Company).[33]

-- Programming services originating on cable have grown substantially, with over 90 national programming services available today.[34]

-- Almost 60 percent of all American television households now subscribe to cable services.[35]

-- The networks' aggregate share of the nationwide prime time viewing audience has declined from roughly 90 percent in 1970 to around 62 percent today.[36]

Lifting the current financial interest restriction would have the benefit of enabling the networks to share in the off-network syndication revenues of prime time entertainment programming -- and thereby generate a significant second

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[32] There are several critical junctures at which a network could exercise its ability to extract such rights as a condition of access: ordering of the pilot and initial episodes; scheduling of the initial network run; ordering of additional episodes; and renewal (of the series in question or another of the same producer's productions). Coalition Further Comments of November 21, 1990 at 12; Coalition Further Reply Comments of December 21, 1990 at 11; Coalition Supplemental Further Comments of March 25, 1991 at 18. Whether rights that are obtained at such times are purchased at prevailing market rates will be carefully examined by the Commission in its future reexamination of our residual rules.

[33] The Association of Independent Television Stations, Inc. (INTV) Comments of June 14, 1990, Exhibit 1 at 3; FBC Television Affiliates Association (Fox Affiliates) Comments of June 14, 1990 at Exhibit A.

[34] Joint Network Comments of June 14, 1990, Vol. II at 77.

[35] Id. at 75.

[36] NBC Comments of June 14, 1990 at 9. The combined network audience share for the 1990-1991 television season was 62%. Washington Post, April 17, 1991, at C6, citing A.C. Nielsen audience data for the 1990-1991 television season.

revenue stream that would enhance their ability to compete in the changing video marketplace of the 1990's.

37. We are well aware, however, that the significant public interest benefits of relaxing the rule largely would be lost if relaxation enabled networks to extract financial interests from program producers for less than a compensatory price or to condition access to their schedules on acquisition of such rights. Although the networks face increasing competition from alternative video outlets and thus may not possess monopsony power in an antitrust sense, their continued, unique position in the distribution of American television programming requires certain regulatory safeguards to help ensure the continued diversity of the programming viewed by most Americans. Indeed, the Commission's mandate does not permit us to presume that programming diversity will flourish so long as the networks do not monopolize the prime time programming market. As the Commission has long recognized and the Supreme Court has long affirmed, our mandate is not merely to police antitrust violations; rather, it requires us to promote the public interest by ensuring a diversity of programming choices for the American viewer.[37]

38. A number of factors lead us to the conclusion that the networks still hold a unique position in the video marketplace of the 1990's. First, the networks continue to benefit from historical structural advantages -- e.g., owned and operated stations on the most desirable frequencies in the largest television markets and a longstanding affiliate distribution system -- which give them by far the greatest hold over the nationwide television audience and those who seek to reach it. Network television is the only programming service available to virtually all (98%) American television households.[38] Indeed, the extent to which the networks' power as the leading procurers of entertainment television programming has withstood substantial marketplace evolution reflects, in no small part, the unique role the networks continue to play in the delivery of television programming to the American public.

39. This unequaled service is particularly crucial to the 40 percent of U.S. households who do not receive cable and who thus rely exclusively on free, over-the-air television for prime time entertainment programming. The American viewing public -- particularly the tens of millions who have access only to free, over-the-air broadcasting -- would be ill-served by a reduction in the supply of high-cost, network quality television entertainment programming.[39] The importance of network television to American viewers is clearly revealed in ratings data. Individually, each of the networks still

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[37] National Broadcasting Company v. U.S., 319 U.S. 190, 223 (1942). This broad mandate has been recognized by DOJ, one of the government agencies responsible for enforcing the antitrust laws. See para. 47 and note 59, infra.

[38] DOC Reply Comments of August 1, 1990 at 16.

[39] As explained below, we find that our relaxed financial interest and syndication rules will help promote the continued vitality of the national free, over-the-air broadcast system.

retains a share of the prime time viewing audience greater than that of all cable networks combined and of all independent television stations combined.[40] Even in cable households, the networks collectively still garner over 60 percent of all prime time viewing.[41]

40. Because of the unparalleled role they continue to play in delivering television programming to the American public, it is not surprising that the networks remain the preferred buyers for producers seeking outlets for prime time entertainment programming that offer an opportunity to build a large following that will enhance syndication value. While cable networks have begun to expand their acquisition of original entertainment programming, the entertainment programming expenditures of each television network alone remain at least double those of all cable networks[42] -- and also greater than those of all first-run syndicators.[43] Moreover, since the networks continue to receive the vast majority of national television advertising revenues (roughly 80 percent)[44] and to command advertising rates substantially higher than those of other competitors,[45] they also are able to pay license fees for prime time entertainment series which generally are considerably higher than those offered by alternative buyers. Indeed, the license fee a cable network pays for such series is typically 30 percent less than the license fee offered by a television network.[46]

41. Significantly, the networks also remain virtually the sole purchasers of prime time entertainment series capable of successful syndication. With few exceptions, typical original cable entertainment series or first-run programs are either topical or game shows that do not fare well in subsequent domestic or foreign syndication.[47] Indeed, even the most highly-viewed cable or first-run entertainment programs[48] do not reach as large an

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40 Coalition Comments of June 14, 1990 at Exhibit C.

41 Id.

42 Lawrence W. Summers, The Economic Consequences of the Financial Interest and Syndication Rules Governing the Television Networks, Table 1, submitted with Joint Network Reply Comments of August 1, 1990.

43 CBS Comments of June 14, 1990 at Fig. 2.

44 DOC Reply Comments of August 1, 1990 at 16 n.40.

45 Coalition Comments of June 14, 1990 at 58.

46 "Cable-TV Networks Strive to Stand Out From the Crowd with Original Programs," The Wall Street Journal, December 17, 1990 at B-1.

47 Coalition Comments of June 14, 1990 at 62-65.

48 Entertainment programming, by definition, does not include news or sports; rather, it encompasses entertainment series, made-for-television movies, mini-series and entertainment specials.

audience as even a moderately successful television network entertainment program.[49] As a result, to date, these programs have been unable to generate the type of viewer following needed to succeed in the syndication market.[50]

42. This record evidence persuades us that, although there is some limited degree of substitutability between television network programming and the programming typically acquired by cable networks or first-run syndicators, producers are validly concerned that, even in today's increasingly competitive video marketplace, there exist few true alternative buyers to the television networks for high quality, prime time entertainment programming. This concern appears only to be exacerbated by standard practices in the television industry, the specialized nature of the network program acquisition process, and the systemically unequal bargaining power of networks vis-a-vis outside producers of new programs.

43. The Coalition asserts, for example, that program acquisition practices are often almost identical among the networks, and that the networks frequently offer common terms and conditions to program producers negotiating programming rights. According to the Coalition, the networks refuse "to negotiate option terms, option dates, the one-year freeze on development, rerun reimbursement terms, spin-off protection, exclusivity, post-term rights, or union escalators."[51] This evidence is consistent with prior conclusions by the Department of Justice that there is a commonality of industry practice among the networks.[52]

44. We have not attempted in this proceeding to determine whether these standardized practices are the result of collusion or conscious parallelism that might implicate the antitrust laws. We are concerned, however, that common practices among the networks may jeopardize a producer's

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[49] DOC Reply Comments of August 1, 1990 at 16.

[50] No cable programming service yet reaches even 60 percent of all U.S. television households, and even the most optimistic projections of cable reach over the next five to ten years do not exceed 65 to 70 percent. Id. at 9.

[51] Coalition Reply Comments of August 1, 1990 at 32.

[52] For a description of the Department's findings, see Coalition Comments of June 14, 1990 at 5-6 and 66-67; Coalition Reply Comments of August 1, 1990 at 87-92. Between 1978 and 1980, ABC, CBS and NBC each entered into consent decrees with the Department after they were charged with violating the Sherman Act. These consent decrees incorporated the terms of the Commission's financial interest and syndication rules and placed additional restrictions, including a four year limit on option terms, on network behavior. See United States v. National Broadcasting Co., 449 F.Supp. 1127 (C.D.Cal. 1978); United States v. CBS Inc., 45 Fed. Reg. 34,463 (1980); United States v. American Broadcasting Cos., 45 Fed. Reg. 58,441 (1980). The rules we adopt today are predicated on the continued existence of these remaining consent decree provisions.

ability to find real alternatives when he or she is dissatisfied with a network's program licensing offer.

45. Compounding this problem is the fact that the network program acquisition process is so specialized that, by the time negotiations over program rights begin, the producer generally already has created a customized product for one particular network. Thus, much of the flexibility that a producer theoretically possesses to "shop" one network against another erodes as the producer proceeds from the "pitch stage" to the commissioning of a treatment or script and then a pilot and network order. Further, this customization and concomitant loss of fungibility occurs even where a producer is not legally bound to a network through the industry practice of a script freeze.[53] As various program producer interests have observed, the acquisition process typically involves considerable discussions between the producer and the network even before pilot production begins. In fact, from the moment the network expresses interest in a concept presented by a producer, the producer begins to develop a customized product designed to suit the individual needs of the specific network. As a result, by the time negotiations over acquisition of program rights begin, it may be difficult, as a practical matter, for a producer unhappy with the network's demands to leave the table and attempt to sell his or her program elsewhere.[54]

46. Competitive forces in the network programming marketplace are further hampered by the superior bargaining power often held by the network at the point that program rights initially are negotiated, whether or not the bargaining disparity is rooted in monopsony power. As the producer interests have observed, such power is clearly wielded over new, untried producers who

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[53] While the networks defend the propriety of the "script freeze" and submit that they do not enforce their exclusivity rights aggressively, the record provides little evidence to support their allegation that a typical script prepared for one network is genuinely marketable to another. See ABC Reply Comments of August 1, 1990 at 43-46; CBS Reply Comments of August 1, 1990 at 15; NBC Reply Comments of August 1, 1990 at 44.

[54] The networks assert that it is not unusual for pilots and programs to be pitched to one network and sold to another. See, e.g., Joint Network Comments of June 14, 1990, Volume II at 45 n.84. We note, however, that the record contains only a handful of examples of such threatened or actual switching, and that the networks' claim is challenged directly by the production community. See Coalition Reply Comments of August 1, 1990 at 85-86 ("the practical reality for producers interested in getting a program on network prime time is that they have one, and only one, potential buyer -- the network that first agrees to participate in their program's development"). The Coalition also presents evidence that, although at least 128 programs switched networks during the 1950's and 1960's, only eight programs have made such moves since 1970. Id. at 94 n.225.

have not yet created a successful network program.[55] Moreover, because it is virtually impossible to tell at the outset whether a proposed program will be one of a season's small handful of hits, even established producers can find themselves at a distinct disadvantage in initial licensing negotiations with a network. Although the networks assert that they, too, can hold inferior bargaining power, their anecdotes generally involve the industry's most successful producers and programs. More importantly, virtually all of the network's examples involve license renegotiations for programs that already are established hits.[56]

47. The record evidence in this proceeding thus establishes that, although the networks' power in the acquisition of entertainment television programs has eroded, it has not diminished to the point that outside program producers would be immune from network extraction of ownership interests as a condition of carriage for less than fair market value. We note that some commenters, including the networks and DOJ, assert that the Commission need no longer be concerned about possible network extraction because the networks individually do not hold "market power."[57] This analysis, however, is based primarily on antitrust principles and does not take into consideration the very real practical difficulties that a producer developing a program for one network faces when attempting to sell his program to another video distributor.[58] Moreover, although DOJ states that it could assume jurisdiction over the networks with regard to future competitive abuses, it also recognizes

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[55] See, e.g., Coalition Comments of June 14, 1990 at 16, 34-41. We note that the Coalition includes more than 200 individual writers, producers, actors, directors and other creative talent. See also Comments of Thomas Carter and Comments of Marian Rees submitted at the December 14, 1990 En Banc Hearing.

[56] See, e.g., CBS Comments of June 14, 1990 at 22-24 (describing renegotiation with Diane English, executive producer of "Murphy Brown"); NBC Further Reply Comments of December 21, 1990 at 17-20 (describing renegotiations over "The A Team," "Hunter," "Golden Girls," "Cosby," and "Dallas").

[57] DOJ also analyzes the rules with respect to economic efficiency models. DOJ finds it illogical to establish policies that limit economic efficiencies, particularly the efficiencies of vertical integration. DOJ Further Comments of December 21, 1990 at 3. However, DOJ views the issue as an antitrust concern only, an approach which ignores the Commission's responsibility to account for its public interest in diversity.

[58] Furthermore, the Coalition argues that antitrust remedies would be insufficient to protect the producers' interests given the excessive costs and protracted delays of antitrust litigation, and it would be unrealistic to expect producers to sue the very entities that control their ability to reach a nationwide audience. Coalition Comments of November 21, 1990 at 5.

that the Commission has a broader public interest mandate under the Communications Act to account for diversity in programs and program sources.[59]

48. We are therefore adopting narrowly tailored safeguards to promote program diversity and prevent, in the words of DOC, "any residual exploitation of network market power." As DOC notes, such safeguards will serve the public interest given the networks' "critical, uniquely important role in the delivery of television programming to the American public" and "the difficulty in mitigating, after the fact, any harm to the independent production and distribution marketplaces that might result from premature abandonment of the Rules."[60]

49. Specifically, we will permit a network to acquire a financial interest in any outside production aired on its network, provided that such rights are purchased pursuant to a separate negotiation initiated no less than 30 days after execution of the initial network license fee agreement (and, where applicable, a pilot production agreement). In addition, whenever a network enters into an agreement for the acquisition of any such rights in an outside production, it shall certify in the public files of its owned and operated stations: (1) that it has complied with the foregoing requirements; and (2) that its licensing or airing of the program was not conditioned on its acquisition of such rights.[61]

50. We conclude that a phased negotiation requirement is the most effective means of protecting producers against network extraction and related abuses short of continuing the ban on network acquisition of financial interests.[62] A network that has not committed to license a program could, as explained above, condition its commitment on a producer's agreement to relinquish financial interests or distribution rights in the program for less than a compensatory price. By separating the negotiation over the license fee from the negotiation over program rights, we limit the networks' ability to tie a producer's grant of such rights to access to the network schedule. Thus, the

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[59] See DOJ Further Comments of December 21, 1990 at 4, 5. Indeed, in the event the rules are not fully repealed, DOJ encourages the Commission to balance its strong interest in competition against the benefits of other policy objectives, such as diversity. Id.

[60] DOC Further Comments of November 21, 1990 at 3 (emphasis added).

[61] In order to prevent "cross-extraction," we will also prohibit a network from conditioning program access to its network on the granting of financial interests with respect to programs aired elsewhere (on other networks or in first-run).

[62] Significantly, DOC believes that a separate negotiations requirement is the most effective means of protecting against network extraction. DOC Reply Comments of August 1, 1990 at 31-32. To the extent the Commission decides to change its current rules, the Coalition also strongly supports such a requirement. Coalition Supplemental Further Comments of March 25, 1991 at 18-21.

network will be able to obtain financial interests and/or syndication rights, but not without clearly providing additional compensation (over and above the basic license fee) to the producer for such rights.

51. We further find that a 30-day delay between the two negotiations reasonably balances the public interest in protecting producers from extraction against the countervailing interest in introducing new competition from the networks for production financing. The 30-day period is long enough to ensure a bona fide separation in negotiations and to enable producers to seek alternative bids for the program rights if they so desire. At the same time, the delay is brief enough that the mere passage of time will not foreclose the networks from the competition for such rights.[63]

52. We note that, as an alternative to a 30-day phased negotiation, the networks suggest that we adopt a "cooling-off" period (e.g., 30 days) for financial interest and/or syndication agreements that are negotiated in conjunction with license rights.[64] This approach, the networks assert, would permit producers to test the network's offer in the market for a comparable period of time. We are concerned, however, that this "safeguard" potentially would be too susceptible to manipulation and thus could be abused. Under this proposal, for example, the network would be able to offer the producer simultaneously a package deal in which the license fee has been artificially reduced in order to make an offer for program distribution rights that is artificially increased. The producer would then be unable to "match" the rights offer within the 30-day cooling-off period and would inevitably be forced to sell his interests to the network -- leaving the producer with less compensation than actual competitive bidding will provide. We accordingly conclude that the 30-day phased negotiations process best accommodates our goal of allowing networks to acquire financial interests while guarding against the loss of diversity that would result from network extraction and conditioning of access.

VI. IN-HOUSE PRODUCTIONS

53. The Commission has received considerable comment in this proceeding on whether it should adopt revised rules for programs produced by a network

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63 DOC proposed a delayed secondary negotiations until after scheduling of a program in order to strike a balance between increasing the business opportunities of the networks and safeguarding the independence of producers in dealing with their valuable interests. See DOC Comments of August 3, 1990 at 4; DOC Reply Comments of November 21, 1990 at 5.

64 See, e.g., April 2, 1991 ex parte filing by NBC on behalf of networks (30 day period); ABC Comments of March 25, 1991 at 8; CBS Comments of March 25, 1991 at 16-17. (14 day period)

itself (commonly referred to as "in-house" productions).[65] Under provisions of Department of Justice consent decrees that expired on November 14, 1990, the three traditional networks were precluded from broadcasting more than five hours per week of prime time entertainment programming "solely produced" in-house.[66] FCC rules currently do not limit the amount of solely produced network programming that a network can air during prime time. Commission regulations do, however, restrict the financial interests and distribution rights that a network may hold in programs it has solely produced. Specifically, the rules preclude networks from syndicating domestically their own productions or even from retaining any right to share the revenues or profits therefrom. By contrast, a network may syndicate in foreign markets those programs, but only those programs, which it has solely produced.[67]

54. As explained below, we have concluded that the networks should now be permitted to retain all financial interests and syndication rights in a more broadly defined class of "in-house produced" programming. This approach is one means of giving the networks a greater opportunity to control their production costs and reap the rewards from substantial investments in programming. In addition, we have decided to permit the networks to syndicate actively their in-house productions both outside and, subject to certain safeguards, within the United States.[68] However, in order to ensure that the networks are not able to undermine the diversity interests that are at the heart of this proceeding, we also are adopting a 40 percent cap on the amount of in-house programming a network may carry on its prime time entertainment schedule.

55. Definition. As a preliminary matter, we note that our rules do not mention "in-house" productions, but rather regulate programs of which a network is the "sole producer." Moreover, neither our rules nor our decisions define when a program should properly be deemed a network "sole" or "in-

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[65] In the Further Notice of Proposed Rule Making, the Commission requested comment on a variety of ways to cap the percentage of scheduled programs in which a network could hold financial interests or syndication rights, including imposing separate limits on in-house productions. Parties were also asked to consider how the term "in-house" should be defined. In addition, Proposal I set forth in the Commission's March 15, 1991 Order Requesting Further Comment sought comment on a proposed schedule cap for in-house productions. Under this proposal, a network could undertake program production without limit (for its own network, another network or first-run), as long as the network did not fill more than 40 percent of its prime time entertainment program schedule with its own "in-house" productions.

[66] United States v. National Broadcasting Co., 449 F.Supp. 1127 (D.C. Cal. 1978); United States v. CBS, Inc., 45 Fed. Reg. 34,463 (1980); United States v. American Broadcasting Cos., 45 Fed. Reg. 58,441 (1980). The decrees contained no descriptive definition of "solely produced." As explained below, neither have prior Commission rules.

[67] 47 C.F.R. Section 73.658(j)(i). See also note 101 infra.

[68] See infra at paras. 106-112.

house" production. We find that, for purposes of our revised rules, it would be more appropriate to use the term "in-house", rather than "sole", production. "In-house production" apparently is a term of art in the program production industry; "sole production" is not.[69] Moreover, given its use in the industry, the term "in-house" would seem to encompass a broader array of production arrangements than we might find embraced within the term "sole production."[70]

56. We find that the public interest would be well served if networks were afforded considerable flexibility in making arrangements to produce programs for themselves, while at the same time were limited in their ability to deny outside producers access to the network prime time schedule. Accordingly, we are adopting a definition of "in-house" that is broad enough to cover not only sole productions, but also co-productions between a network and an outside entity. In particular, we will define "in-house productions" as those network programs which are: (1) solely produced by the network; (2) co-produced by the network with foreign production entities;[71] or (3) co-produced by the network with outside domestic production entities[72] that initiate such arrangements.[73]

57. The comments addressing the definition of "in-house" suggest that we should consider several key elements in assessing when a program has been either solely or co-produced by a network. First, commenters encourage us to examine who owns the program and thus controls its commercial exploitation.[74] A simple way of analyzing this issue, of course, is to examine who owns the copyright to the program -- the network or an outside entity. Second, several commenters recommend that, because who controls a program is often influenced by who pays for its production, we should also examine the extent to which the

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69 See ABC Comments of March 25, 1991 at 9-11; CBS Comments of March 25, 1991 at 15; NBC Comments of March 25, 1991 at 5-7 and 27-29; and NBC Ex Parte Filing Re In-House Definition of April 2, 1991 at 3.

70 Id.

71 By "foreign production entities", we mean those production entities registered to do business and located outside of the United States or its territories.

72 By "outside domestic production entities", we mean those production entities registered to do business and located within the United States or its territories that are not owned or controlled, in full or in part, by the network with which they seek to co-produce. See Section 73.662 (c).

73 The requirement that the domestic company initiate the co-production arrangement is discussed in more detail at para. 62, infra.

74 See ABC Comments of March 25, 1991 at 10; CBS Comments of March 25, 1991 at 12; Coalition Further Comments of November 21, 1990 at 9.

network bears the financial risks of producing the program.[75] Third, the commenters are nearly unanimous that we should assess whether the network retains full business control over the production process -- i.e., whether it has the authority to incur and limit costs and to direct how the production will proceed.[76]

58. We believe that each of these criteria is useful in analyzing who actually "produces" a given program. Making a program for network television is obviously a complex enterprise that involves numerous creative, technical and financial experts and the outlay and coordination of considerable resources. Given the extensive involvement of so many persons, we believe the best way of deciding who is the "producer" for purposes of our new in-house rules is to examine who in fact controls the production process, who pays for that process and who owns the resulting program.

59. Accordingly, a program will be deemed to have been "solely produced" by a network if the network solely owns the copyright in the program, retains full business and production control,[77] and maintains full financial responsibility for the program. A program will be deemed a "co-production" if the network and an outside entity share the copyright, business and production control, and financial responsibility for the program.

60. Rights in In-House Productions. As described above, the Commission's existing rules do not permit the networks to syndicate domestically the programs they solely produce, nor are they allowed to retain any right to share the revenues or profits therefrom. As discussed in other sections of this Order, we have decided to permit networks to acquire financial interests, as well as domestic and foreign syndication rights, in outside-produced programs, subject to certain safeguards designed to protect producers against network extraction and conditioning of access. Such extraction and conditioning concerns do not arise, however, with respect to programs solely produced by a network, since it already owns all rights in the program and

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75 ABC Comments of March 25, 1991 at 10; NBC Comments of March 25, 1991 at 6-7.

76 CBS Comments of March 25, 1991 at 12; NBC Comments of March 25, 1991 at 6.

77 We note that requiring a network to retain full business and production control, rather than full creative control, will allow networks to enter into production service contracts with outside producers who routinely maintain a degree of creative control over their projects -- even when those programs are properly considered in-house productions. We believe that requiring a network to retain complete creative control thus would reduce the diversity of creative influences on network programming.

therefore has nothing to "extract." Accordingly, we will now allow networks to retain financial interests and syndication rights in their sole productions.[78]

61. In addition, we conclude that a network should also be permitted to retain financial interests and syndication rights in domestic and foreign co-productions meeting our "in-house" definition.[79] For the reasons described above, however, we remain concerned that a network could potentially extract such program rights from a domestic non-network co-producer, and even insist on the co-producer entering into such a co-production arrangement, as a condition of carriage on the network. We believe that this potential abuse can be effectively addressed by adopting two narrowly focused safeguards.

62. Specifically, we will require that domestic co-production arrangements be initiated by the outside entity and not by the network.[80] This initiation requirement will ensure that the co-production arrangement is in fact desired by the producer rather than imposed by the network. In addition, we will require that domestic co-production agreements be subject to a 30-day cooling-off period, during which the outside producer can decide to nullify or commit to the network co-production arrangement. Such a cooling-off period will give an outside producer who may have been coerced into signing a co-production arrangement (or into conveying his or her program rights to the network) the option of negating the arrangement within 30 days of signing the co-production agreement.[81]

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[78] Networks and producers alike also have urged the Commission to allow networks to sell the back-end rights of their in-house productions to outside producers. CBS notes that it has disposed of the domestic syndication rights to its in-house programs by reselling them to the independent "service contract" producers of particular programs. CBS Comments of March 25, 1991 at 11. We agree that such arrangements are publicly beneficial in that they provide for a sharing of costs between networks and producers without the danger that the "sale" to the producer is in reality an "extracted" acquisition of rights by the network in an outside production.

[79] The networks' ability to syndicate actively the in-house programs in which they retain domestic syndication rights is discussed in detail in Section VII, infra. In brief, a network will be permitted to syndicate directly all in-house programs (whether solely produced, or co-produced with a domestic or foreign entity) that air on its own network. By contrast, in-house productions that air on another network, or that are distributed as first-run programming, must be syndicated through an independent syndicator.

[80] The producer's initiation of such a negotiation shall be documented in writing by the producer prior to the commencement of the negotiation.

[81] Because a producer-initiation requirement may not be as practical for network participation in the growing transnational business of foreign co-productions, we will permit network entry into such arrangements free of our domestic co-production safeguards. See also note 101, infra.

63. We also recognize that, because our new syndication rules will allow networks actively to syndicate in-house programs both at home and abroad,[82] it is possible that a network could seek to coerce a producer into such arrangements so as to be able to syndicate programs it otherwise could not. The 30-day cooling-off period for domestic co-productions will help protect outside producers seeking to enter co-production agreements from such network coercion. In order to ensure that coercion does not also arise when an outside producer participates in a network sole production, we will prohibit networks from conditioning access to the network schedule on an outside producer's willingness either to bring the program completely in-house as a sole production or to enter into a network co-production arrangement.[83]

64. **Schedule Cap.** Numerous comments have been submitted in this proceeding on whether the Commission should restrict the amount of in-house programming that a network can carry on its prime time schedule. INTV and the Independent Stations (representing The Chris-Craft United Television Station Group, Gaylord Broadcasting Company, Tribune Broadcasting Company, Channel 50 TV Corp., and MCA Broadcasting Inc.), for example, recommend that a cap of 25 percent be placed on the amount of weekly prime time entertainment programming that a network may produce, either in-house or jointly with independent producers, as a safeguard against the substantial damage to competition that could be caused by unrestricted network entry into the domestic syndication marketplace. Similarly, the Coalition contends that an in-house production limit of 25 percent is essential to promote program diversity by ensuring the continued existence of a competitive, independent program supply market. It argues that unchecked freedom to produce (or to threaten to produce) all programs in-house would give the networks total leverage over producers in program negotiations. The Coalition also claims that an in-house limit is needed to assure that the networks do not become the source of syndication rights to most off-network programs and to prevent the networks from influencing the syndication market by steering the bulk of off-network programming to certain syndicators.

65. By contrast, the networks oppose any caps on in-house production, arguing that such caps would create a new area of regulation that was deemed unnecessary when the rules were adopted. They note that the consent decree limits on in-house production, which were entered into voluntarily and not based on adverse judicial factual findings, have now expired and that no government agency supports action to reinstate them. The networks further assert that there is no evidence to support new FCC regulations in this area,

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82 See Sections VII(A) and (B), infra.

83 To ensure that the networks are complying with our in-house safeguards, we will also require each network to certify on a semi-annual basis that it has complied with the producer-initiation and 30-day cooling-off period requirements for domestic co-productions, and that it has not conditioned access to its schedule on an outside entity's willingness to bring the program in-house as a sole or co-production. These certifications must be maintained in the public files of the network's owned and operated stations. See Section X, infra.

and that the Commission may not constitutionally impose restraints on the First Amendment rights of the networks to broadcast their own speech.

66. We find that the imposition of an in-house schedule "cap" would serve three distinct public interest goals. First, as discussed in detail in Section VI below, we believe that an effective way of allowing the networks some entry into the domestic syndication marketplace would be to permit the networks to syndicate actively their in-house productions. We also believe, however, that we must guard against the possibility that the networks might engage in widespread abuse in the domestic syndication marketplace by airing and later syndicating an unlimited amount of in-house programming. By placing a cap on the amount of in-house programming that a network can carry on its prime time schedule, therefore, we seek to curb potential network syndication abuses while at the same time assessing the actual impact of limited network involvement in that marketplace.

67. In addition, as discussed above, we remain concerned about the networks' ability to coerce outside producers to produce programs in house. As the Coalition and other commenters have recognized, a schedule cap on in-house productions would serve as a check on widespread network circumvention of our outside production safeguards by limiting the amount of programming with respect to which networks could engage in coercive practices.

68. Finally, in our view, an unlimited ability to produce the entire network schedule in-house would allow networks to circumvent or, in any event, undermine the very diversity of viewpoints that the First Amendment and our residual rules on network acquisition of financial interests in outside productions are meant to promote. In this regard, we are unpersuaded by the argument that a network has only a "theoretical" capability to "solely produce" all of its programming and thus that limits on such productions are unnecessary.[84] Indeed, to countenance even that theoretical possibility would amount to an abandonment of one of our chief public interest responsibilities -- promotion of diverse sources of programming.[85]

69. We are thus requiring that the networks fill no more than 40 percent of their prime time entertainment program schedules with their in-house productions. We recognize that various program producer and independent television interests have suggested that any in-house cap be set much lower, at 25 percent of the prime time schedule.[86] By contrast, the networks have indicated that an in-house schedule cap initially set at 40 percent (and phased up to 50 percent over the next four years) of the prime time entertainment

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[84] For a discussion of the networks' recent in-house production activities, see para. 112, infra.

[85] See Associated Press v. U.S., 326 U.S. 1 (1945); Metro Broadcasting v. FCC, 110 S.Ct. 2997 (1990).

[86] Independent Stations Further Comments of March 25, 1991 at 9; INTV Further Comments of November 21, 1990 at 26; Coalition Further Comments of March 25, 1991 at 23.

schedule would not unduly curtail their business opportunities.[87] DOJ states that there is a remote possibility that total repeal of the rules could have an adverse impact on the supply of syndicated programming to local stations.[88] The FTC, in turn, asserts that any schedule cap should be set at least at 40 percent, given the variables involved in acquiring syndicable entertainment programming.[89]

70. On balance, we believe that a 40 percent in-house cap best accommodates the competing concerns of the commenters in this proceeding. Proponents of a 25 percent cap claim that, because only a small percentage of network programs actually make it into syndication, a low cap is needed to ensure that the networks do not become the syndicators for all the programs on their schedules that ultimately are syndicated.[90] However, as other commenters have noted, this analysis assumes, that the networks will be able not only to predict accurately which programs will make it into syndication but also to produce all such programs in-house. In view of these uncertainties, we believe that a higher cap can safely be imposed. We therefore have decided to set the in-house cap at 40 percent of the prime time entertainment schedule.[91] We conclude that such a cap will be effective in both (1) granting the networks considerable flexibility in arranging their schedules and actively syndicating programming, and (2) promoting program diversity and competition by ensuring

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87 See Network Ex Parte Filing of April 2, 1991. See also Fox Ex Parte Letter, March 21, 1990 (supporting 50 percent schedule cap).

88 See DOJ Comments of October 5, 1990 at 23, 43-44; DOJ Comments of December 21, 1990 at 13, 15. DOJ, however, did not analyze schedule caps from the perspective of local stations; its arguments were addressed more to the impact on program producers. Since protecting program producers from potential network abuses is not our only reason for the schedule cap, we are not constrained by DOJ's analysis in this regard.

89 FTC Further Comments of December 21, 1990 at 15 n.38. Again, to the extent these comments were addressed more from the perspective of the impact upon program producers rather than local stations, we view this analysis as one of several factors informing our decision.

90 Although the Coalition also recommends the adoption of a subcap of 25 percent for non-episodic entertainment programming (e.g., made-for-television movies, mini-series and specials), Coalition Comments of March 25, 1991 at 24, we believe that the 40 percent schedule cap on in-house productions adopted herein adequately addresses our concerns for programming diversity.

91 Compliance with the 40 percent schedule cap will be measured during a television programming year, which will commence on the first day of September and end on the last day of August the subsequent year. In addition, a network will be required to maintain semi-annual reports listing, for the preceding 180-day period, all in-house productions that have aired on its (or any other network's) prime time entertainment schedule. See para. 171, infra.

that the networks are not able to dominate either the network or the syndicated programming marketplaces.[92]

71. Finally, we note that several commenters have argued that a schedule cap on in-house productions violates the networks' freedom of speech. Even to the extent that a schedule cap may implicate First Amendment concerns,[93] we believe that adoption of a 40 percent in-house cap passes constitutional muster.[94] As discussed in more detail below, a primary purpose of the cap is to limit active network involvement in domestic syndication in order to prevent possible anticompetitive abuses in the syndication marketplace. Such abuses, if they occurred, would threaten the viability of other competitors in the syndication market, particularly non-network syndicators and independent television stations. As the Supreme Court has stated in a similar situation,

> [i]t would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom . . .. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . .. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.[95]

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92 See United States vs. Storer Broadcasting Company, 351 U.S. 192 (1956), (The Commission has authority to engage in reasonable line-drawing.)

93 See Coalition Supplemental Further Comments of March 25, 1991, App. 10 at 1-3.

94 It should be recognized, from the outset, that our cap does not limit the amount of in-house productions in which a network may engage. Rather, it only limits the networks' ability to fill their own prime time entertainment schedules with such programs to a degree that would foreclose meaningful program source diversity.

95 Associated Press v. United States, 326 U.S. 1, 20 (1945). Moreover, as a United States District Court expressly ruled in its approval of the NBC consent decree, in-house production limits do not implicate (let alone violate) the First Amendment:

> [I]t may be observed that the judgment restricts NBC's participation in a commercial venture and in no way attempts to dictate the content of programs which may be exhibited on the NBC network. It is clear that the First Amendment does not shield NBC or any other network from the proscriptions of the Sherman Act.

United States v. NBC, 449 F. Supp. 1127, 1139-40 (C.D. Cal. 1978).

While the instant case may not involve a Sherman Act violation, we nevertheless believe that the overall purpose of our public interest analysis is consistent, in this sense, with that of the antitrust laws, i.e., to promote diversity and competition by preventing potential anticompetitive conduct.[96]

72. In addition, the in-house cap will affirmatively promote diversity of viewpoints on network television -- a goal that the courts have expressly held is consistent with the First Amendment.[97] Networks with an unlimited ability to produce their entire network schedules in-house would be able to keep all programming from independent sources off their networks. Such a result would allow the networks potentially to circumvent or, in any event, undermine the very diversity of viewpoints that the First Amendment and the residual rules adopted in this proceeding are designed to promote.[98] In sum, the schedule cap adopted in this Order is consistent with the First Amendment.[99]

VII. OFF-NETWORK SYNDICATION

73. Under the current syndication rules, television networks are

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[96] See Coalition Further Supplemental Comments of March 25, 1991, App. 10 at 5 (wherein it states that public interest considerations are consistent with the antitrust laws.)

[97] See Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).

[98] See, e.g., Associated Press v. Labor Board, 301 U.S. 103, 132-33 (1936).

[99] In considering the arguments that we would chill network First Amendment rights by imposing a schedule cap on in-house productions, we have been guided by the following factors: First, this schedule cap is not a cap on program production; networks continue to be free to produce as much in-house programming as they desire. Second, the potential harm to local television stations is one of our primary concerns in maintaining limited structural restrictions on network domestic syndication activities and in adopting a schedule cap on in-house productions. Local broadcasting is a vital service to the American public, and there is a substantial governmental interest in retaining rules which promote a diverse program supply that ensures strong local broadcast stations. Third, preservation of structural incentives provides the most effective means for ensuring diverse and competitive sources of program supply and distribution. And finally, the government may adopt carefully calibrated restrictions to address potential anticompetitive behavior without violating the constitutional rights of those being regulated. See also Section 73.3555(c) of the rules (newspaper/broadcast crossownership). FCC v. National Citizens Committee for Broadcasting, 435 U.S. 912 (1978).

prohibited from syndicating programs for non-network broadcast[100] distribution within or outside the United States. The rule applies to both off-network and first-run syndicated programming. A limited exception permits networks to engage in the foreign syndication of (and to hold foreign syndication rights in) programs of which they are the "sole producer."[101] The networks may not, however, syndicate their sole productions within the United States, nor retain any right to share in the revenues or profits therefrom.

74. In this proceeding, we sought comment on whether we should modify or retain these restrictions on network involvement in domestic and foreign syndication. For the reasons discussed below, we conclude that modification of these rules is appropriate to permit existing and emerging networks additional flexibility to compete in today's video marketplace.

75. At the same time, the record indicates that, despite an increase in viewer alternatives during the past 20 years, the networks retain the potential to influence adversely the diversity and competitiveness of the syndication marketplace. The networks' ability to extract ownership interests from outside producers as a condition of network carriage applies as much to syndication rights as to financial interests. We already have found that such injurious practices remain genuine concerns in today's program acquisition market, notwithstanding the significant changes in the video marketplace since 1970. The dangers of extraction simply remain too great to give the networks the potential to extract both financial interests and distribution rights for their entire schedule. Fair compensation for distribution rights is critical to the viability of independent producers. Accordingly, we will subject network acquisition of domestic and foreign syndication rights in outside produced programs to the same narrowly focused safeguards we adopted for network acquisition of financial interests.

76. In addition, we find that network entry into domestic syndication could potentially harm local television stations and the public they serve. Local broadcasting is a vital service to the American public, and the independent television sector is critical to the vitality of that service. As a result, we conclude that the domestic syndication marketplace should continue to receive some measure of regulatory oversight until market circumstances dictate otherwise. However, we believe that the record warrants lifting the current prohibition on network involvement in foreign syndication activities altogether.

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100 In 1981, the Commission clarified that the rules apply only to network acquisition of broadcast financial interests and do not preclude networks from holding non-broadcast interests in television programming, such as merchandising or movie or cable distribution rights. Memorandum Opinion and Order, 87 FCC 2d 30 (1981).

101 The Commission has also stated that the syndication restrictions do not apply to the acquisition of foreign-produced programs for foreign distribution. See 1972 Implementation Order, 35 FCC 2d 411, 420 n.11 (1972) and 1970 Stay Order, 26 FCC 2d 28, 31 n.3 (1970).

77. Accordingly, as described below, we have decided: (1) to permit network entry into the business of domestic syndication on a limited basis (i.e., by allowing a network to syndicate actively "in-house" programs aired on its network); (2) to test the efficacy of affiliate favoritism and warehousing safeguards to protect against potential network abuses in syndicating such in-house programs; (3) to allow networks to acquire domestic syndication rights in all other off-network programming, subject to the requirement that any such programming be distributed through an independent syndicator; and (4) to permit networks to syndicate actively in foreign markets without limitation. This balanced approach, we believe, will afford the networks new opportunities in the domestic and international marketplace while also helping to ensure a diverse and competitive supply of programming to local television stations. In addition, by allowing the networks only partial entry into active domestic syndication, the Commission will be able to obtain an ongoing record of the actual impact of network involvement in that domestic marketplace without unnecessarily jeopardizing its vitality.

A. Domestic Syndication

78. As described in the 1970 Order, the Commission adopted the current syndication restrictions out of the same concerns that prompted it to forbid television networks from acquiring financial interests in network programming. By prohibiting the networks from purchasing the right to syndicate programming actively, the Commission sought to prevent the networks both from extracting distribution rights from independent producers and from subsequently favoring, for network exhibition, the programs in which they held such rights.[102] With respect to syndication rights, as well as to financial interests, the Commission was concerned that possible coercive practices would harm program diversity by limiting the access of outside producers to the national audience available only through the networks.

79. The Commission in 1970 articulated yet another reason for keeping networks out of the syndication business. Specifically, the Commission feared that the networks would be able to affect competition adversely in the syndication marketplace by favoring their affiliates in syndication sales. Such favoritism would work to the detriment of both independent stations competing for syndicated product and other syndicators who did not enjoy a network-affiliate relationship. The Commission thus concluded that a prohibition on active network involvement in syndication would "eliminate the potential for competitive restraint" by the networks.[103]

80. When revisiting the syndication rule in 1983, the Commission noted that there was a third rationale for restricting the networks' participation in the syndication business. A number of producer and independent station interests asserted at that time that if the networks were permitted to syndicate programming actively, they would have an incentive to withhold (i.e., "warehouse") off-network programming from the market in an effort to restrict

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102 1970 Order, 23 FCC 2d at 397-98.

103 1970 Reconsideration Order, 25 FCC 2d at 331.

supply and thereby drive up prices for syndicated product. Such warehousing could not only inflate network profits from syndication and thus lower the network license fees for network programming paid to program producers; it also could harm independent television stations by making it more difficult for them to purchase programming they deem essential.

Comments

81. For the most part, commenters addressing the syndication rule in this proceeding debate the long-standing issues of (1) whether the networks have the ability to extract domestic syndication rights from program producers; (2) whether the networks could and would warehouse programming in the syndication market; and (3) whether the networks could and would harm competition in syndication through affiliate favoritism. The parties have also submitted considerable comment on a new economic theory which asserts that the networks could "monopolize" the syndication market by acquiring purely passive financial interests.

82. Program producers, syndicators, independent stations and some network affiliates assert that the syndication rule has been highly successful in promoting a healthy and diverse syndication market. These parties state that the rule has helped spawn the tremendous growth of independent stations that has occurred in the past twenty years and the contemporaneous growth of the first-run syndicated programming market. For example, the Coalition claims that, as a result of the rule, the number of distributors of syndicated television programming has increased from 92 to 148 in the last eight years alone.

83. Producer and independent station interests also claim that any change in the ban on domestic syndication would create a risk that the networks would dominate the program syndication marketplace, thus undoing much of the good that has been accomplished by the syndication rule. Independent stations contend that they would be competitively disadvantaged if forced to compete with network affiliates for programming syndicated by the networks. In particular, they claim that in the absence of the syndication rule, the networks, separately or in collusion, would have the incentive and the ability to engage in tactics such as selective warehousing, favoritism towards their owned and operated stations (O&Os), advance notification to affiliates and discriminatory pricing, any and all of which could threaten the viability of the independent stations, whose existence and health were a major concern of the Commission in promulgating the original rule.

84. Similarly, the producer interests argue that the networks would be able to transfer their power over network programming into the market for off-network programming. The producers claim that, if permitted to act as program syndicators, the networks would have the incentive and the ability to warehouse syndicated product, thereby restricting supply and artificially increasing prices. These commenters further state that the networks would be able to tie access to their prime time schedules to the acquisition of domestic syndication rights from program producers, thereby further leveraging themselves into the syndication market. In addition, the producers echo the independent stations' concerns that the networks would use their close and

influential relationships with affiliates to harm independent stations and other syndicators who do not share a similarly beneficial contractual arrangement.

85. The producer interests also present a new economic analysis which asserts that the networks could restrict the supply of off-network programming to independent stations simply by acquiring even passive financial interests. According to this theory, a network that obtained a financial interest in an outside-produced program could later refuse to contribute its proportionate share of investments designed to enhance the syndication value of the program. Because the producer would then be forced to bear a disproportionate share of the investments needed to prepare the program for syndication, the network's refusal to cooperate would serve to impose a "tax" on producer investments. Such a tax in turn would discourage producers from making the necessary investments in syndicated programming, a result that allegedly would lead to a reduced supply of syndicated product, decreased network license fees, and increased syndicated programming prices to independent stations.

86. For their part, the networks, joined by FTC and DOJ, dispute that they would have the ability to affect competition adversely in the syndication marketplace. They claim that before the rules, when the networks had a stronger position in the video marketplace, they did not possess a dominant share of the syndication market. Thus, they argue, they could not individually or collectively acquire the market power needed to dominate domestic syndication in today's more competitive marketplace. The networks, DOJ and FTC further argue that the warehousing theory is speculative and question whether the networks could collude successfully to withhold syndicated product, given the array of competing programs, including off-Fox and off-cable product. In addition, these parties dispute the assumptions that underlie both the investment restriction and affiliate favoritism theories, and assert that both models assume the networks would act against their own economic interests.

87. The networks also claim that the syndication rule is not responsible for the beneficial marketplace changes described by the producers and independent stations. They state that, rather than being fueled by the syndication restrictions, the growth in independent stations is properly attributed to an overall increase in demand for advertising and the enhancement afforded to UHF independent stations by cable carriage. Furthermore, the networks assert that the off-network syndication industry has become more, not less, concentrated as a result of the rule.

88. By contrast, most of the networks' own affiliates addressing the syndication rule favor a continued ban on domestic syndication.[104] These commenters believe that network participation in domestic syndication would constitute a conflict of interest and claim that a network acting as a syndicator could indeed use affiliation rights and compensation to pressure their local affiliates to purchase the network's syndicated product. Thus, the

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104 An exception is the CBS Television Network Affiliates Association, which supports elimination of the syndication rule.

affiliates maintain that the networks, if permitted to participate in domestic syndication, would gain added leverage which could influence program decisions on the local affiliate station level.

89. DOC, a supporter of relaxing the rules, agrees that there is at least a theoretical conflict between the networks' role as exhibitors and their role as program suppliers. As a result of this potential conflict, DOC believes that network syndicators could indeed favor their O&Os and affiliates when selling syndicated product. In addition, DOC states that there is some possibility that totally eliminating the domestic syndication restriction could prompt the networks to take actions that would result in independent stations' being unable to acquire programming on a fair and timely basis.

Discussion

90. As noted above, the Commission originally adopted the domestic syndication restrictions to prevent the networks from engaging in two different types of anticompetitive abuses. First, the Commission decided to prohibit the networks from acquiring domestic distribution rights in order to preclude the networks from extracting those rights from independent producers and conditioning access to their schedules on the acquisition of such rights.[105] Second, the Commission decided to prevent the networks from actively syndicating off-network programming in order to prevent anticompetitive behavior in the domestic syndication marketplace that could harm both independent syndicators and local independent television stations.[106]

91. As previously discussed, we believe that the public interest would best be served if the networks were permitted, subject to safeguards, to acquire financial interests and syndication rights from outside producers. Allowing the networks to bid for such rights would help promote network program diversity by opening up new sources of financing for independent producers, and by giving networks the opportunity to generate additional revenues in an increasingly competitive video marketplace. Although we remain concerned that the networks retain the ability to extract distribution rights from outside producers in exchange for access to their schedules, we have determined that these abuses may be prevented through adoption of narrowly focused safeguards.

92. Accordingly, as stated earlier, we will permit networks to acquire domestic syndication rights from outside producers, provided that the network offer for the distribution rights is made in a separate negotiation initiated no less than 30 days after the date the network license fee (and, where applicable, pilot production) agreement was executed. As with financial interests, we will also require a network purchasing domestic syndication rights from an outside producer to certify in the public files of its O&Os that it has complied with this phased negotiations requirement and that its

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105 1970 Order, 23 FCC 2d at 398.

106 Id.

licensing of the program was not conditioned on its acquisition of the distribution rights.[107]

93. These safeguards, however, do not address the second category of concerns that prompted the Commission to prevent the networks from actively engaging in domestic syndication. We turn now, therefore, to the issue of whether the networks could adversely affect competition in the syndication marketplace if they were permitted to syndicate actively the programs in which they acquire syndication rights.

94. At the outset, we would note that the current prohibition on network domestic syndication has contributed substantially to the very goals the Commission had in mind in 1970: growth and success of independent television and first-run syndication as competitive sources of program diversity, and the creation of a competitive syndication market. In contrast to 1970, there are now more than 100 separate competing distributors of syndicated programming offering almost 250 first-run and almost 170 off-network programs to local stations.[108] Because the syndication industry provides such a diverse, competitive source of program supply to local stations, network manipulation of this industry would not be in the public interest.

95. Yet, for the reasons described below, we find that the networks as domestic syndicators could exploit their market structure to engage in anticompetitive abuses during the routine course of business, with or without collusion among them. Networks allowed into domestic syndication could, for example, adversely affect competition in the syndication marketplace by encouraging warehousing of off-network programming from the market. Network syndicators could also use affiliation rights and compensation to pressure their local affiliates to purchase the networks' less attractive syndicated product, extending the networks' already substantial influence on program decisions at the local affiliate station level.[109] And a network could find it in its economic interest to favor its affiliates in the syndication of its more attractive programming.[110] Networks employing such strategies could ultimately exert a significant influence over syndicated programming sold to individual local independent and affiliate broadcast stations and, regardless of their

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107 See para. 49, supra. To prevent "cross-extraction" of rights, we shall also prohibit networks from conditioning program access to their own networks on the granting of syndication rights with respect to programs aired elsewhere (on other networks or in first-run).

108 PPDC Comments of June 14, 1990 at Exhibit C.

109 See Comments of ABC Television Affiliates Association, June 14, 1990 at 14-17.

110 Each of these potential anticompetitive abuses is described in more detail in paras. 96-98 and 101-104, infra.

ability to monopolize the market, could significantly threaten the program diversity we are mandated to preserve.[111]

96. **Affiliate Favoritism**. The Commission remains concerned, as it was when it adopted the syndication rules, that a network engaged in domestic syndication would have the economic incentive to discriminate in favor of its own affiliates or O&Os over other stations (particularly independent stations) in each market. Because the networks strive to maximize revenues by maximizing audiences for (and thus boosting the strength of) their network, O&Os and affiliates, they would naturally possess the marginal incentive to funnel their most attractive syndicated programming to these stations.[112]

97. Along with these incentives to favor affiliates, the networks also possess the ability to engage in such anticompetitive practices, given their affiliate relationships, market penetration, and program acquisition expenditures.[113] For example, a network-syndicator could engage in tactics such as favoring the bids of its own affiliates, providing advance notification to affiliates, block booking, instituting affiliate program tie-ins, and discriminatory pricing.[114] These practices could occur during the routine course of business, with or without collusion by the other networks.

98. Thus, even if a network chose not to engage in widespread favoritism, it has both the incentive and the ability to favor its affiliates in particular markets in order to gain not only an immediate revenue benefit, but also a long-term competitive edge in those markets. As INTV and its economists have shown, new, high-quality off-network programs are critical to the counterprogramming strategies of local independent stations.[115] Should

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111 We need not resolve the antitrust debate between DOJ and INTV concerning the extent to which syndicated programming constitutes a relevant submarket. See DOJ Comments of December 21, 1990 at 15; INTV Comments of June 14, 1990 at 12-13. We have a substantial interest in promoting the diversity of program supply because of the critical role off-network programming plays in the viability of independent local television stations.

112 Contrary to the suggestion that a network's economic interest would lead it to favor whichever station bid highest in a given market, a network would rationally factor into that economic equation the marginal potential ratings effect on its affiliated station's network programming of carrying -- or, alternatively, competing with another station carrying -- the syndicated program at issue. INTV Comments of June 14, 1990 at 41.

113 See paras. 38-41, supra.

114 For a description of these tactics and their adverse effects, particularly on independent television stations, see INTV Comments of June 14, 1990 at 39-42.

115 As INTV indicates, to be "viable competitors to network affiliates," "independent stations must retain the rights to attractive off-network programs." "It is critically important for the Independent to acquire

their access to even a few such programs be denied as a result of a network-syndicator's affiliate favoritism, the financial health of independent stations (many of which already operate at the margin) could be seriously threatened.[116]

99. We note that the networks and other commenters have analyzed the affiliate favoritism issue in terms of whether the networks, through collusion, could obtain sufficient market power over off-network programming to restrain substantially competition in the national syndication market. This approach thus invokes a traditional antitrust analysis to assess whether the networks are capable of monopolizing the syndication marketplace.[117] We do not believe, however, that our regulatory response should turn simply on whether the networks could engage in sufficient affiliate favoritism tactics to monopolize the entire off-network programming market. To the contrary, the Commission has an affirmative mandate to promote diversity at both the national and local levels, not merely to prevent antitrust abuses.

100. The relevant issue for our inquiry, therefore, is whether a network could use affiliate favoritism strategies to the detriment of competing local stations, especially independent stations, in particular local television markets. The record evidence on this question persuades us that such a scenario remains a real possibility, even in today's more active syndication marketplace. Indeed, INTV and others argue convincingly that a network could cause substantial damage to independent stations by steering even a limited number of its most attractive programs to its own stations and affiliates, thereby depriving local stations of the very programs on which they rely to anchor their schedules.[118]

101. **Warehousing.** The record also indicates that networks would have the economic incentive and the ability as syndicators to delay strategically (by temporarily "warehousing") the off-network domestic syndication of programs they control.[119] Such warehousing would harm independent stations, in

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competitive programming" in the "early fringe" and "prime-time access" dayparts, which can "constitute up to one-half of an Independent's total revenue." INTV Comments of June 14, 1990 at 12, 13 and 19, citing Frazier, Gross & Kadlec, Inc., Independent Thinking, An Overview of the Independent Television Industry (January, 1986).

116 Id. at 36, Exhibit 4.

117 See Joint Network Comments of June 14, 1990 at 108.

118 INTV Comments of June 14, 1990 at 36; DOC Comments of August 1, 1990 at 39-40; Independent Stations Comments of June 14, 1990 at 16.

119 INTV Comments of June 14, 1990 at 38. At our en banc hearing of December 14, 1990, the President of CBS indicated that programming "shouldn't be warehoused after it's off the air." With respect to programming still receiving network exhibition, however, he stated "...if we have "Murphy Brown" on the air, why should we be competing with episodes of "Murphy Brown" on other

particular, by making it more difficult, if not impossible, for them to purchase the popular off-network programming essential to their competitive viability.

102. The networks and other parties have submitted economic studies asserting that the networks either have no incentive or lack the market power to attempt to monopolize the syndication market through a warehousing strategy.[120] In particular, these commenters question whether off-network programming is a separate antitrust submarket and whether the networks could gain control of that market through collusive activities. However, the antitrust analysis is not completely controlling in this docket. We emphasize again that the Commission's role is to preserve and promote competition and program diversity, not simply to prevent grossly anticompetitive behavior that might violate the antitrust laws.[121] Viewed from this perspective, we remain concerned that a network could selectively withhold programming from syndication in individual television markets, to the serious detriment of other network affiliates and, in particular, local independent stations.[122]

103. INTV, for example, notes that a network has strong incentives to enhance the competitive position of each local affiliate. INTV then posits a situation in which, if the affiliate has a sufficient inventory of attractive syndicated programming on hand, the network may be able to bolster the affiliate's position by withholding a popular program in the affiliate's market for some period of time in order to prevent the program from being sold to a competitor such as an independent station. This strategy may be a particularly cost-effective approach for the network that is seeking to prop up a sagging affiliate, to entice a new affiliate into the market, or to undermine competition from a strong independent.[123]

104. INTV also raises the possibility of another type of warehousing -- delaying syndication of a program until completion of the network run. The record indicates that a network could decide to delay the syndication of a program where the additional advertising revenues from an extended network-exclusive run could be expected to exceed the additional revenues from prompt syndication.[124] Such delayed syndication could clearly harm independent stations competing for popular syndicated product, thus undermining the diversity that the Commission has traditionally sought to promote.

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channels that are buying it at a much lower cost than we're paying for it?" Transcript of December 14, 1990 En Banc Hearing at 66.

120 See Economic analysis appended to Joint Network Comments of June 14, 1990 and Joint Network Reply Comments of August 1, 1990.

121 See para. 37, supra.

122 See also note 111, supra.

123 INTV Comments of June 14, 1990 at 37-38.

124 Id. at 38; see also note 119, supra.

105. We note that the network's incentives in either of these scenarios are not based on the network's power in the overall syndication marketplace, but rather derive from the network's structural relationships with its affiliates in local television markets. Because diversity and competition in that local marketplace could be adversely affected should a network engage in even selective withholding, we conclude that, even as we consider relaxing our former rules, we must continue to protect local broadcasters against potential network warehousing.[125]

106. Syndication of In-House Productions. Although we remain concerned that a network could engage, at a minimum, in selective affiliate favoritism and warehousing strategies, we also believe that the public interest will be furthered if the networks are allowed some entry into the syndication marketplace. Allowing the networks to syndicate actively some portion of the programs carried on their prime time schedules will grant them added flexibility to generate revenue and compete more effectively in the video marketplace, and will grant them relief from the economic harm they assert as a consequence of the present total prohibition on syndication activities. The networks have filed comments asserting that, in order to remain competitive, they need additional sources of revenue from their ongoing operations.[126] Permitting the networks limited entry into domestic syndication should provide a substantial amount of relief in this regard. Allowing limited network involvement will also enable many potential emerging networks to take advantage of certain economies of scale, using a broader base of syndication revenues to fund the substantial costs of operating a national program distribution system.

107. In light of our interest in encouraging greater network participation in domestic syndication while also protecting competition and diversity in that marketplace, we have decided to adopt a measured regulatory response that will (1) grant the networks limited entry into domestic syndication, subject to safeguards, and (2) enable us to assess the actual impact of that entry, and the effectiveness of the safeguards, when we revisit our revised rules in four years. The record contains as many conflicting assertions about the adequacy of various regulatory safeguards as it does about

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125 We do not, in this regard, rely on the specific analysis set forth in the so-called "investment deterrence" model. See study prepared by Dr. Warren-Boulton submitted by the Coalition on June 14, 1990. That analysis has been questioned in many respects by other parties to this proceeding and relies on assumptions that are difficult to verify. For example, it necessarily assumes that there are significant investments that can be made in programming which increase its "syndicability" without at the same time increasing its attractiveness as network programming. It is not necessary to rely on this filing or find that networks have the ability to act as monopolists, however, to conclude that networks have the ability and incentive to manipulate the program acquisition and syndication marketplace in ways (discussed herein) that disserve diversity and the public interest.

126 Joint Networks Comments of June 14, 1990, Volume I, at 116-117.

the networks' ability to engage in anticompetitive abuses in the first instance.[127] We have therefore decided to implement rules that will permit us to test the efficacy of certain safeguards while at the same time ensuring that the networks are not able to engage in widespread abuses through unrestricted entry into domestic syndication.

108. Under our revised rules, networks will be able to participate in the domestic syndication marketplace by actively syndicating the in-house productions that air on their own networks. In granting the networks this relief, we note that two of our most important concerns, extraction and conditioning program access, are not relevant for bona fide in-house programming. In addition, because we have limited the amount of in-house programming that a network can include on its prime time schedule, we will also be limiting the potential abuse that could stem from network participation in the domestic syndication marketplace. Indeed, the FTC's analysis of the 40 percent benchmark as a relevant threshold was one of the factors informing our selection of a percentage schedule cap on in-house productions.[128] By restricting the networks' active syndication activities to in-house programming and simultaneously capping the amount of such programming that can be included in the network schedule, we will be able to grant the networks entry into domestic syndication while at the same time ensuring that they do not monopolize that marketplace.

109. In addition, since we have found that affiliate favoritism and warehousing pose genuine threats to the public interest, we believe that some behavioral safeguards on networks' in-house syndication activities are necessary to preserve and promote competitive sources of program diversity. We remain concerned, however, that these safeguards may provide insufficient protection against anticompetitive behavior by the networks as syndicators. For example, barter syndication arrangements, station group sales, and affiliate compensation would provide ready means of obscuring network acceptance of lower bids from their affiliates -- abuses that would be particularly difficult to detect and prevent.[129] We thus intend to monitor closely the efficacy of our safeguards to minimize the risk that direct network participation in domestic syndication will jeopardize the supply of off-network syndicated programming critical to the competitive viability of independent television stations.

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[127] INTV, for example, asserts that anticompetitive conduct by the networks would be so difficult to detect that there are simply no regulatory safeguards that could effectively prevent network abuses, short of keeping the networks out of domestic syndication entirely. INTV Further Comments of November 21, 1990 at 32.

[128] See discussion of FTC analysis at para. 69, supra.

[129] Although the networks argue that the Commission can rely on other profit participants, such as the program producers, to police against affiliate favoritism, we believe that such discrimination will be difficult for such parties to detect in many cases. See note 127, supra.

110. We have thus decided to prohibit networks from engaging in affiliate favoritism when syndicating their in-house programming. Specifically, networks will be required to make their syndicated off-network programming available to non-affiliates on terms and conditions no less favorable than those offered to affiliated or O&O stations. Affiliate favoritism shall be rebuttably presumed if a program in which a network owns active syndication rights is syndicated to network O&Os or affiliates in more than 30 percent of the markets where the program has been sold.[130] Even in the absence of such statistical evidence, complainants of course will be allowed to present direct evidence to show affiliate favoritism in particular markets or discrimination against particular stations. Over the next four years, we will monitor the efficacy of this safeguard to assess whether it is easily circumvented. We do not intend for the 30 percent threshold merely to become a new industry norm for syndication self-dealing by networks.

111. In addition, we will impose an anti-warehousing safeguard in order to prevent networks from unduly delaying syndication of programs they control. Under this safeguard, a network must release a program into the syndication market after four years or within six months following the end of the network run, whichever is sooner.[131] While a four year/six month rule may not perfectly fit every situation, we believe that it balances the networks' right to control the use of their programs for a certain period of time, while also ensuring that they cannot strategically manipulate the syndication of such programs without limit. In order to monitor network compliance with the affiliate favoritism and warehousing safeguards and to evaluate better their effectiveness, we will require the networks to maintain semi-annual reports in their O&Os' public files listing all in-house productions and the domestic syndication history of those productions.[132]

112. Finally, we remain concerned that a network's domestic syndication of in-house produced programs which air on another network could allow it to control a share of the new off-network programs syndicated to local stations far in excess of our 40 percent schedule cap.[133] Since November 14, 1990, the networks have been allowed to produce and schedule in-house programs without restriction. Although the networks still have been prohibited from domestic syndication to date, we note with interest the increased activity undertaken by network in-house production entities since that time. A March 25, 1991 Daily Variety article reported that for the Fall 1991 season, ABC Productions has introduced 4 pilots and will co-venture another. NBC Productions has produced 3 pilots and has a share of a fourth. CBS Entertainment Productions is producing one pilot and has a share in two others.

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130 See, e.g., Independent Stations Comments of March 25, 1991 at 15.

131 We note that a four year/six month rule was strongly supported by the Fox Affiliates and INTV. FBC Television Affiliates Further Comments of November 21, 1990 at 20; INTV Further Comments of November 21, 1990 at 19.

132 See Section X, infra.

133 See Reply Comments of INTV, August 1, 1990 at 25.

The potential for such trends to proliferate without limit through total repeal would seriously threaten to undermine diversity. For this reason, and because the Commission desires more time to assess the impact of network involvement in the domestic syndication market and the efficacy of our safeguards, we will limit network domestic syndication to the in-house programs that air on its own network schedule.

113. **Acquisition of Domestic Syndication Rights.** In addition to being able to syndicate actively their in-house productions in this country, networks will be able, as noted above, to acquire domestic syndication rights in programs produced by outside entities (subject, of course, to our phased negotiation and certification requirements) and to retain such rights in programs produced in-house for other networks. However, in order to ensure that the networks are not able to engage in widespread anticompetitive abuses in the syndication marketplace, we will continue to prohibit the networks from actually distributing these categories of programming.

114. Accordingly, where a network has acquired domestic syndication rights in programs produced in-house for another network or in programs produced by outside producers, the programs must be distributed domestically through an independent syndicator in which the network holds no interest. The independent syndicator shall also be completely insulated from the network with respect to any programming distributed for the network -- i.e., there shall be no contractual arrangements or understandings between the network and the distributor regarding the subsequent sale or scheduling of the syndicated program that would have the direct or indirect effect of affiliate favoritism. The Commission may also consider complaints if a party can show a pattern of affiliate favoritism undermining the credibility of the "independence" of such a syndicator.[134] The distributor will also be subject to the same anti-warehousing safeguards described above for the networks as syndicators.[135]

115. In conclusion, we have determined that complete repeal of our prohibition on network acquisition and distribution of syndication rights would threaten independent television stations and network affiliates with network manipulation of the syndication market. Our modification of the rules, by contrast, will permit a network (1) to syndicate certain programming where extraction dangers are less likely to be present and the efficacy of narrowly tailored safeguards may be monitored, and (2) to share in the profits from the transfer of syndication rights in all their other prime time entertainment programming to an independent syndicator. We will first analyze the effectiveness of the anti-warehousing and affiliate favoritism safeguards before considering further repeal of syndication restrictions on the remainder of the networks' prime time entertainment schedule.

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134 This independent syndicator requirement, proposed by INTV, is designed to ensure that outside programming, in-house programming aired on other networks, and first-run programming is distributed through a bona fide independent syndicator. See INTV Further Comments of November 21, 1990 at 17.

135 See para. 111, supra.

B. Foreign Syndication

116. Under the current rule, television networks are prohibited from engaging in, or holding financial interests in, the foreign syndication of television programs exhibited on their network, other than those of which they are the "sole producer." When adopting this restriction in 1970, the Commission stated its concern that the networks had sufficient market power over program producers to force them to sell their foreign syndication rights for less than fair market value in exchange for network access. The Commission also feared that the networks may be able to favor those programs in which they held foreign syndication rights at the expense of programs in which they did not hold such rights.[136]

Comments

117. The producer, distributor and independent station interests commenting in this proceeding support continuation of the foreign syndication prohibition. Independent stations, for example, assert that substantial indirect risks would result from network participation in foreign syndication, including giving the networks an incentive to over-extend the network run of a program series in order to maximize foreign syndication revenues. Similarly, these parties argue that the networks might be inclined to air programs that have the greatest potential for foreign syndication (e.g., one-hour action programs) rather than those that have the greatest domestic syndication value (e.g., half-hour comedies). In this fashion, the independent stations assert, the network conflict of interest resulting from foreign syndication activities could affect the networks' program schedules and the supply of valuable network programs to the domestic syndication market. The Coalition and PPDC likewise oppose network foreign syndication, arguing that (1) the networks will abuse program suppliers and extract foreign syndication rights for less than their full value as the price for network access; (2) the networks will be able to strike deals to gain a competitive edge over non-network distributors in a manner that disserves the public; and (3) keeping the networks out of foreign syndication is critical to the survival of independent producers.

118. The networks, DOC and the Economic Policy Institute (EPI), in turn, favor repeal of the foreign syndication restriction. The networks state that they do not have the market power needed to extract foreign syndication rights from program producers. In addition, the networks and their supporters contend that network entry into foreign syndication would be pro-competitive and state that the rules unwisely prevent the established networks, all of which are U.S. companies, from fully participating in the international marketplace.

119. CBS further claims that its foreign syndication arm currently is forced to operate on a very limited scale and at a higher unit cost than its competitors. According to CBS, the current restrictions also undermine the efficiency of potential co-production ventures with foreign partners that

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136 1970 Order at 398-399. See also discussion of network extraction concerns in Section V, supra.

could significantly reduce its programming costs. By undermining the efficiency of foreign co-productions, CBS argues, the rules further erode the ability of U.S. broadcast networks to compete with other program suppliers, such as cable networks, in domestic as well as foreign markets.

120. Similarly, NBC states that limits on the networks' foreign syndication activities do not help or protect independent producers because eliminating three potential bidders for foreign syndication rights constricts the number of buyers available to small production companies. The result, according to NBC, has been a consolidation of market position by the eight MPAA studios that collectively account for over 80 percent of revenues derived from foreign syndication of television programs.

121. DOC supports removal of the foreign syndication prohibition, stating that its Globalization Study indicates that there are opportunities abroad for U.S.-produced programming and growing pressure on media firms to exploit those overseas markets to defray production costs.[137] A study by Robert B. Cohen, submitted by EPI and originally submitted to DOC for its Globalization Study, examines the impact of policies recently adopted by the European Community (EC). EPI believes that the networks are in the best position to respond to the opportunities created by Europe's increasing demand for television programs and improved distribution of such programs. The Cohen study also concludes that the ability of the U.S. to compete in global markets is ill-served by the rules because they prevent some competitors from being fully active and, in effect, favor some domestic (or even foreign) competitors (studios) over others (networks).

122. In addition, EPI estimates that the foreign syndication restriction results in a loss of $600 million to $1.8 billion annually in U.S. exports to Europe. As a result of the rule, the networks are unable to enter into certain business or ownership arrangements with firms that are themselves involved in program syndication or that have continuing financial interests in programs. Networks also are precluded from entering the growing European market by the normal means being used by other competitors, such as joint ventures, export agreements and acquisitions, that respond to the EC Directive concerning European content of programming. Thus, EPI claims, three of the potentially strongest competitors from the U.S. are precluded from competing to supply the growing demand for programming in what will be the largest market after 1992.

123. Witnesses at the Commission's en banc hearing presented similar arguments concerning the loss of possible exports. For example, former U.S. Trade Representative William Brock noted that, although the U.S. is trying to obtain changes to the EC's broadcast directive, that directive, as it is implemented, will present a Catch-22 situation for the U.S. networks. The directive will limit the demand for programs produced by non-Europeans but increase the demand for programs co-produced with Europeans. Thus, Senator Brock pointed out, while there will be less demand in Europe for network-

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137 See Comprehensive Study on the Globalization of Mass Media Firms, Notice of Inquiry, 55 Fed. Reg. 5792 (Feb. 16, 1990).

produced programs that existing rules permit them to sell abroad, those same rules prevent the networks from participating in co-productions that Europeans want to buy. Finally, Senator Brock argued that our rules prevent the networks from realizing the competitive efficiencies of worldwide distribution that are available both to other U.S. participants in the worldwide marketplace and, of course, to all the non-U.S. participants.

124. The FTC argues that from an antitrust perspective, foreign syndication rights differ from domestic syndication rights because domestic independent television stations cannot be harmed by the exercise of foreign rights. With regard to both types of rights, the FTC finds no compelling reason to limit or prohibit network acquisition of such rights and suggests that conventional antitrust enforcement be used instead of specific regulatory limits.[138] Similarly, DOJ states its belief that repeal of the rules is unlikely to result in anticompetitive conduct by the networks, and suggests leaving the issue of network use of alleged market power to the antitrust laws which DOJ is willing and able to administer.[139]

Discussion

125. We conclude that the public interest would best be served if the existing restrictions on active network syndication in foreign markets were repealed. Accordingly, we have decided to permit the networks to syndicate internationally all of their in-house productions, whether aired on their own or another network, or in first-run syndication. In addition, the networks will be allowed to syndicate internationally all outside productions aired on their own or another network.[140]

126. These modifications will provide the networks with much of the relief they seek, including a far greater ability to compete in the international program marketplace. Networks will now be able to take advantage of newly created opportunities abroad for U.S.-produced and co-produced programming, particularly given Europe's increasing demand for and improved distribution of such programming. Indeed, given an overseas program export market of approximately $2 billion, program content quotas of at least 50 percent European origin in the EEC,[141] and the proliferation of competitive

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138 FTC Further Comments of November 21, 1990 at 3, 13.

139 DOJ Further Comments of November 21, 1990 at 16.

140 Based on our previously discussed extraction concerns, however, we shall also bar "cross-extraction." Thus, networks will be prohibited from conditioning program access to their own networks on the granting of ownership rights with respect to programs aired elsewhere (on other networks or in first-run).

141 The United Kingdom, for example, has proposed a 75 percent content quota, and France presently has a 60 percent content quota. Economic Policy Institute Reply Comments of July 27, 1990 at 18; Statement of Jack Valenti, MPAA, at December 14, 1990 En Banc Hearing.

production resources around the world, we see no reason to preclude the networks from this market. We note that, even under present rules, the existing networks have sought investments or co-production relationships with companies in Europe.

127. Allowing the networks to syndicate actively their in-house co-productions with foreign entities will be one particularly beneficial result of our action. The networks have argued persuasively that they face competitive obstacles in the burgeoning European program production marketplace because they are not permitted to syndicate, either domestically or abroad, programs produced in joint ventures with foreign entities.[142] By liberalizing our "in-house" definition and rules to allow networks to engage in active domestic and foreign syndication of foreign co-productions, we directly respond to the networks' call for regulatory relief that would make them viable and attractive partners in the blossoming European production marketplace.

128. We further find that allowing virtually unlimited entry into foreign syndication will be pro-competitive, enhancing competition in the foreign syndication market as well as U.S. competitiveness overseas. The networks' international syndication and related activities could benefit the domestic economy by increasing jobs and income. The U.S. viewing public could also benefit to the extent that networks invest the additional revenues they receive from foreign syndication activities into more diverse and creative programming.

129. Despite these benefits, however, we believe that it is important to retain certain restrictions on the networks' acquisition of foreign syndication rights in prime time entertainment programming from outside producers. Although direct network participation in the business of foreign distribution does not raise warehousing or affiliate favoritism concerns, network acquisition of foreign distribution rights from independent producers presents the same extraction concerns raised by network acquisition of financial interest and domestic syndication rights.[143] The record reveals that foreign syndication revenues provide critical financing for many outside producers, particularly since they are often received early in the program distribution process.[144] Indeed, many independent producers have argued in this proceeding that they could not remain solvent without the immediate income stream from foreign distribution rights which makes it possible for them to finance current productions.[145]

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142 See Joint Network Comments, Volume II, June 14, 1990 at 133-137.

143 See discussion of network extraction in Section V, supra.

144 See Statement of Ethan J. Podell, Orbis Communications, and Statement of Leonard Hill, Allied Communications, Inc., at December 14, 1990 En Banc Hearing.

145 Coalition Reply Comments of December 21, 1990 at 21.

130. Given these concerns, we conclude that network acquisition of foreign syndication rights from outside producers should be subject to the same limited and narrowly tailored extraction safeguards we have adopted for financial interests and domestic syndication rights. Networks seeking to purchase foreign distribution rights will thus be subject to the 30-day phased negotiation and certification requirements discussed in Section V, supra. These safeguards should help ensure a continued diversity of program sources. However, the Commission shall monitor the effects of the relaxation of the foreign syndication rules on programming diversity in the U.S. television marketplace and will re-examine in particular the efficacy of our safeguards in ensuring the continuation of that diversity.

VIII. FIRST-RUN SYNDICATION

131. In the preceding section, we determined that our public interest goals of supporting diversity and competition in the local television marketplace will best be served if the networks are permitted only limited entry, subject to safeguards, into the domestic syndication marketplace for off-network programming. In so doing, we stressed that local broadcasting is a vital service to the American public and that our regulatory aim should be to promote affirmatively competition in that marketplace.

132. Our existing syndication rule completely precludes domestic syndication of first-run programming by a network. For the reasons discussed below, we conclude that this prohibition should be continued in view of the record evidence that the participation of networks as syndicators in the domestic and international markets for first-run syndicated programming would unnecessarily jeopardize competition and diversity in the television marketplace. That evidence establishes that first-run syndicated programming is the only nationally distributed broadcast television programming that competes directly with network and off-network syndicated programming and thus plays a critical role in providing a diversity of program services to the American broadcast audience. It is also clear that local broadcast stations use first-run programs in various dayparts to provide viewers with attractive, nationally distributed alternatives to network or off-network programming. Given the unique importance of first-run programming to local television stations and the potential competitive threat that would be posed by network entry into the first-run programming marketplace, we find that the networks should continue to be prohibited from actively syndicating any first-run programming or from holding financial interests and syndication rights in first-run syndicated programming produced by outside entities.

Comments

133. Numerous parties address whether the Commission's concerns about network involvement in the domestic syndication marketplace should extend to first-run syndicated programming as well as off-network programming. First, program producers, syndicators, independent stations and some network affiliates agree that the syndication rule has been highly successful in

promoting a healthy and diverse syndication market. These parties state that the rule has helped spawn the tremendous growth of independent stations -- and the contemporaneous growth of the first-run syndicated programming market -- that has occurred in the past twenty years. For example, they attribute to this rule, at least in part, the growth in the number of distributors of syndicated television programming from 92 to 148 in the last eight years.

134. Producers and independent stations assert that the healthy competition that now exists in the first-run syndication marketplace would be seriously threatened by network entry into that marketplace. These parties fear that, if the networks were permitted to syndicate first-run programming, they would be able to exert undue power over such programming by taking improper advantage of their existing relationships with their affiliates.[146] The Coalition states that network participation in first-run syndication would enable them to become both owner and buyer of the programming through their O&O stations. In these circumstances, the Coalition claims, the networks not only could dictate license terms but also could drive out other production entities by requiring network association as a condition for shows carried on the O&Os. INTV is especially concerned that networks have the same incentives to favor affiliates with first-run programs as they do for off-network programs. Thus, INTV seeks additional insulation for first-run syndication to guarantee the passivity of any financial interests in first-run syndicated product, suggesting periodic reports even when syndication rights are sold to other syndicators.

135. Alternatively, the FTC contends that networks should be permitted to acquire financial interests in and to syndicate actively first-run programming, provided that affiliates are prohibited from scheduling any such programs from their network during the prime time access hour. The FTC and Fox agree that consumers would benefit by stimulating competition in the first-run marketplace through network entry, and Fox further claims that relaxing the current prohibition would create greater diversity and choice. The FTC contends that the record evidence does not indicate that the networks, individually or collectively, could restrict the supply of first-run programs nor pose a direct threat to downstream purchasers of first-run programming. The FTC also believes that the entry of networks into first-run programming would not threaten competition in the upstream production of such programming, and it asserts that any possible harm to certain competitors by network entry does not imply the action is anticompetitive.

136. The networks argue that the first-run restriction ensures the continued domination over television production, financing, and syndication by

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146 In its comments, PPDC expresses particular concern about networks' ties with their owned and operated stations. PPDC claims that the O&Os account for a large percentage of the nation's television households (16%) and that first-run programs, in order to be successful, must be carried in at least most of these top markets. As a result, PPDC maintains, local stations in smaller markets are more inclined to purchase programming already cleared in the larger markets. According to PPDC, these facts should heighten the Commission's concerns about affiliate favoritism in first-run syndicated programming.

a few Hollywood studios. They also claim there is no rational basis to permit syndication of in-house productions for a network's own schedule, while excluding productions for other networks, first-run programs, or products for the network's schedule produced by others. The networks also believe that they also should be permitted to syndicate first-run programming to the same extent that Fox currently does. CBS claims that rather than preventing the networks from engaging in first-run syndication at all, the Commission could prescribe the same affiliate favoritism and warehousing "safeguards" as proposed for a network's syndication of its own in-house programming.

Discussion

137. Based on comments from independent syndicators, independent television stations, and group owners of affiliate stations, as well as our own experience and expertise, we have decided to continue certain prohibitions on network involvement in the syndication of first-run programming. As described below, this decision is based on the following reasons: (1) local broadcast stations need an unimpeded supply of first-run programming to compete with network and off-network programming in various non-prime time schedule parts; (2) allowing the networks into first-run syndication could enable them to exploit their owned and affiliated stations to handicap the launch of new first-run programs by independent syndicators; such market control would be detrimental to the maintenance of a diverse, competitive marketplace; (3) allowing the networks into first-run syndication could undermine the Commission's objective in establishing the prime time access rule (i.e., network affiliates are to provide up to one hour per day of non-network programming in the prime time period); and (4) by virtue of their market structure, network involvement in first-run syndication would diminish the amount of independent first-run programs aired on local television stations.

138. We have thus decided that continued structural safeguards on first-run syndication are necessary until the Commission obtains a more current record of network syndication practices, and has assessed their impact on the diversity of program distribution. In doing so, we emphasize that we are primarily concerned with the potential harm to local television stations, particularly independent or non-network stations, and ultimately the American viewer, that could result from unbridling the remaining network influence in the video marketplace.

139. First-run syndication is a unique marketplace in which clearance by stations in major markets is critical. Unlike off-network programming, there is no pre-existing demand for any particular first-run program; such demand generally must be built on a station-by-station, market-by-market basis. In this environment, clearance by the higher-rated broadcast stations in the major markets is vital, particularly in the top three markets, and most of those stations are owned by the existing broadcast networks.[147]

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147 See PPDC Comments of June 14, 1990 at 15-16; Westinghouse Broadcasting Company, Inc. Comments of November 21, 1990 at 4-6; INTV Comments of June 14, 1990 at 30-35; King World Productions, Inc. Comments of November 21, 1990 at 6-7.

140. The Commission finds that allowing the networks into the first-run syndication business would enable them to exploit their owned and affiliated stations so as to either extract rights in or handicap the launch of new programs by independent first-run syndicators. Lacking the advantage of a built-in distribution network, an independent syndicator must sell his wares station-by-station -- particularly in the top markets in which the network O&Os or affiliates are the leading outlets. A network, by contrast, possesses the incentive and ability to sell, en bloc, to its affiliates and owned stations -- an advantage that clearly can be used in anticompetitive ways. If they succumbed to the temptation to do so, networks could harm local broadcast stations that require an unimpeded supply of first-run programming to compete with network and off-network programming in various non-prime time schedule parts. Given their inherent structural advantages, the networks have the potential to exercise market control in the supply of first-run programming to an extent that would be detrimental to the maintenance of a diverse, competitive marketplace. The potential anticompetitive consequences of permitting networks to engage in, or extract rights in, first-run syndication are thus so significant that they warrant retention of rules precluding such activities.[148]

141. In addition, allowing the networks to become first-run syndicators and to supply such programming during the prime time access period could undermine the Commission's objectives in establishing the prime time access rule (PTAR). The networks could gain an important advantage over independent first-run syndicators by packaging first-run programs specifically to their owned and affiliated stations in such a way as to avoid the PTAR prohibition against "networking" in excess of three hours of prime time programming daily. We believe that the resulting dramatic reduction in the sources and variety of access period programs would be contrary to the public interest.[149]

142. We also conclude that the rules have largely achieved the basic purpose of the financial interest and syndication rules, as well as that of PTAR, to encourage "the competitive development of alternative sources of television programs."[150] More original programming now exists from more non-network sources than at any time prior to adoption of the rules. Allowing the networks to syndicate first-run programming, then, would by necessity diminish the amount of non-network, nationally produced programming aired on broadcast television, a major source of competition and diversity.

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148 Id.

149 See King World Productions, Inc. Comments of November 21, 1990 at 10-11 and December 21, 1990 at 3; INTV Comments of June 14, 1990 at 43-45; Independent Stations Comments of November 21, 1990 at 14-17; Westinghouse Broadcasting Company Comments of November 21, 1990 at 6-7; PPDC Comments of November 21, 1990 at 8-10.

150 1970 Order, 23 FCC 2d at 397.

143. We conclude, therefore, that behavioral safeguards to prevent affiliate favoritism and warehousing are inadequate and ill-suited to stem the potential for abuse in the important first-run syndication marketplace. To the contrary, structural restrictions concerning first-run syndication remain necessary until the Commission obtains an empirical record of future network practices in the syndication market and the impact on diversity of program supply and distribution. Given the overall objective of fostering first-run programming as a diverse and competitive alternative to programming that is distributed or has been distributed through the network system, limiting network ownership of rights in such first-run programs is a necessary corollary. The safeguards developed with respect to network acquisition of rights in programming aired on the networks are appropriate in a context in which the networks are necessarily already involved in program selection, control and financing. In the first-run area, application of similar provisions allowing network acquisition of rights and interests would dilute the objective of providing greater programming choice, particularly to affiliated stations, competitive with and outside the network ownership and distribution process. Accordingly, the networks will continue to be precluded from actively syndicating such first-run programming, domestically or internationally. We also will continue to prohibit networks from acquiring financial interests or syndication rights in first-run programming produced by outside entities.[151]

144. At the same time, we find that, in view of the increasingly competitive marketplace of the 1990s, we should provide the networks some flexibility to enter the first-run production market. We therefore will now permit a network to produce entertainment programming for first-run syndication and to retain a financial interest as well as foreign syndication rights in such programming "solely produced" in-house.[152] However, due to previously discussed concerns regarding the unique nature of the first-run syndication market, we will require that such programming be syndicated domestically through an independent syndicator pursuant to the distribution safeguards described above in paragraph 114. We also clarify that network-produced first-run programming shall be considered network programming for purposes of the prime time access rule.

IX. NETWORK DEFINITION AND TRANSITION RULES

A. Network Definition

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[151] See also note 101, supra. See also Comments of INTV, August 1, 1990 at 30; King World, November 21, 1990 at 10; Westinghouse, November 21, 1990 at 4; and PPDC, November 21, 1990 at 5.

[152] Based on our extraction concerns that are not amenable to separated or producer-initiated negotiation safeguards in the unique first-run context, a network will not be permitted to hold financial interests and syndication rights in first-run programming co-produced by the network with outside entities.

145. The existing rules define a network as "any person, entity or corporation which offers an interconnected program service on a regular basis for 15 or more hours per week to at least 25 affiliated television licensees in 10 or more states . . .."[153] In this proceeding, we sought comment on whether we should retain or modify this definition to reflect more accurately current marketplace realities. As described below, we have decided that a television network will now be defined as any entity providing more than 15 hours per week of prime time programming on a regular basis to interconnected affiliates that reach, in aggregate, at least 75 percent of television households nationwide.

146. In developing this new network definition, we have attempted to balance our interest in encouraging emerging broadcast networks with our interests in maintaining a diversity of network program supply, independent sources of program distribution for independent and affiliated local stations, and the continued competitiveness of existing broadcast networks. Thus, while seeking to promote emerging networks, we remain concerned that national networks can both extract ownership rights from program producers and manipulate the syndication market to the detriment of diversity in the sources and distribution of prime time entertainment programming.

147. We find that new networks will provide an increase in the amount and the diversity of prime time entertainment programming that will ultimately benefit the public. Such networks can also breathe new life into failing independent television stations, thus preserving outlet diversity.[154] This increased competition should also lessen the need for future regulation of broadcast networks. Of course, after an emerging network has achieved a significant degree of size and market power comparable to existing networks, it should be subject to our network restrictions to prevent potential abuse. Such restraints should apply until the market provides sufficient alternative outlets for the purchase and distribution of all types of commercial programming.

Comments

148. The major networks and their affiliates support repeal of the financial interest and syndication rules, thereby eliminating any need to modify the definition of networks subject to the rules. However, if the rules are retained, these parties believe that the network definition should be unchanged. In particular, the networks and affiliates oppose any new or further exemption from the rules for Fox or any other network/affiliate organization that is in direct competition with "older" networks and their affiliates. Some parties contend that there is no basis for any distinction between Fox and the older networks. They point out that Fox is actively engaged in the production and acquisition of entertainment programming and its affiliates now number 129, with access to 90% of television households. Moreover, Fox achieves double-digit market shares, has several programs that

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153 47 C.F.R. Section 73.658(j)(4).

154 FBC Television Affiliates Association Reply Comments of August 1, 1990 at 12.

consistently defeat the competition in ratings, and pays license fees comparable to that of other networks. These commenters contend that Fox can no longer be characterized as an emerging network; rather, it is a well-established fourth national network.

149. Non-Fox affiliated independent TV stations also support the current network definition. They state that the 15 hour threshold has worked effectively by subjecting major networks to the rules without encompassing the numerous entities that are clearly not the kind of networks the Commission intended to regulate. They further point out that the Commission's waiver procedures are always available as a safety valve to preclude application of the rules to a network where circumstances indicate no potential for any of the abuses that the rules were designed to prevent.

150. Media Access Project and Office of Communication of the United Church of Christ (MAP/UCC) supported retaining the current 15-hour threshold, but excluding three categories of prorogramming exempted from our PTAR rules. They also advocated dropping the "number of states covered" and "affiliates supplied" criteria and adding an audience share measurement, noting that this is the most appropriate test of an emerging network's market power.[155]

151. Other parties are not satisfied with the current definition of a network and/or its application to the Fox network. The Fox network and its affiliates claim that Fox does not possess anything approaching the market power that the dominant three networks have. Fox states that existing network definition is inadequate to measure market power. Fox claims that as a result of the sweeping changes in the video marketplace over the last 20 years, the 15-25-10 benchmark that triggers the rules has become an anachronism which indiscriminately pulls in network "small fry and leviathans alike." Fox suggests that a market power analysis should be applied across the entire video program supply spectrum and that similarly situated entities should be subject to comparable regulations, including the financial interest and syndication rules, regardless of the technological or contractual means employed to deliver programming to consumers. In Fox's view, only those firms with market power are capable of the types of abuse the rules were designed to prevent. Accordingly, Fox maintains that only those firms should be subject to restrictions.

152. Pappas Telecasting Co. (Pappas) would extend the network definition to include other distributors of video programming. It proposes that the definition of entities subject to these rules include not only the three major networks but also entities that 1) distribute video entertainment and informal programming to consumers indiscriminately on a "mass media" basis, over a wide geographic area, 2) reach a significant number of people, and 3) hold a certain minimum share (to be defined) of the available audience. According to Pappas, such "network entities" would include program syndicators such as Paramount Pictures; multiple system cable operators such as Tele-Communications, Inc.; cable programming services such as Turner Broadcasting System; and emerging technology ventures such as direct broadcast satellite

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155 Comments of MAP/UCC of November 21, 1990 at 7-9.

"Sky Cable" service or home satellite dishes which capture the requisite minimum share of audience.

Discussion

153. Based on the record compiled in this proceeding, we find that the current network definition is no longer appropriate for the purpose of these rules.[156] The existing definition admittedly provides a clear and objective guideline for when a person or entity becomes a network. However, the definition is inadequately tailored to the Commission's desire to avoid inhibiting the emergence of newly competitive networks and diverse programming choices.

154. Indeed, in 1988, we stated that the existing definition was no longer adequate to distinguish traditional national networks from other program distributors.[157] We continue to believe that the present standard fails to measure the potential strengths and current roles of video broadcasters within the national marketplace as affected by technological advances. For example, the domestic satellite service easily permits any programmer to reach all the states in the continental U.S. easily, thus rendering state criteria an inaccurate measure of a network's standing within the market.

155. We also believe that the present definition is excessively restrictive since the 25 stations component is now such a small fraction of available affiliates and could be reached easily by regional broadcasters with no intention of developing national audiences. Consequently, a new definition must balance the interests of enhancing competition with the equally important objective of treating all competitors equally in order to create a "level playing field" within the industry.

156. We find that a definition focusing upon prime time hours of programming and national broadcasting reach will be more consistent with the Commission's traditional concern for preserving diversity of programming.[158] Once an emerging network achieves a significant degree of relative size or power in the marketplace through prime time programming and national audience reach, its potential for abuse should be constrained through appropriate regulatory safeguards. In particular, we conclude that a network shall be defined as any entity providing more than 15 hours per week of prime time

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156 See Fox Broadcasting Company Comment, June 14, 1990 at 11-13; FBC Television Affiliates Association Comment, June 14, 1990 at 25-30; Pappas Telecasting Companies Comment, June 14, 1990 at 5-6.

157 See Further Notice of Proposed Rule Making, BC Docket No. 78-309, 3 FCC Rcd 2746 (1988).

158 The existing Prime Time Access Rule is an additional constraint focusing on network participation in prime time programming. See 47 C.F.R. § 73.658(k).

programming on a regular basis[159] to interconnected affiliates that reach, in aggregate, at least 75 percent of television households nationwide. As a result, we believe that the new network and transitional rules will allow emerging program services more flexibility to increase audience reach or penetration.

157. As the majority of commenters have advocated, the new definition emphasizes the hours of prime time programming because the concern in this proceeding has been the ownership of rights in such programs at a national level. We are particularly concerned that the overly restrictive nature of the prior definition may have caused some emerging networks to curtail legitimate business plans in anticipation of coming within the rules' strictures. The Commission recognizes that networks sustain a high quality of programming by generating advertising revenues from numerous hours of programming viewed by substantial audiences. Therefore, the new definition will allow entities to gain a meaningful but still just partial presence in the most profitable broadcasting period. We have found that the 15-hour threshold serves as an adequate standard. In our judgment, as noted above, allowing up to 15 hours permits an emerging network to begin to establish an everyday presence, albeit limited, by scheduling an average of up to two prime time hours per night before becoming subject to the rules. However, as an entity starts to provide more of a full prime time programming service, it would have a growing potential to affect significantly the off-network and first-run syndication marketplace.[160]

158. Furthermore, the Commission has never intended to subject regional broadcasters to the Rules, a result that could conceivably occur under the existing standard due to the increased number of stations in many markets. Our extraction and syndication market manipulation concerns primarily implicate networks attempting to achieve national audiences. Thus, we believe that the new 75 percent reach limit will distinguish substantially national networks from regional broadcasters.[161] The Commission recognizes that emerging networks must eventually encounter the same regulatory treatment as established networks. Accordingly, upon developing a substantial national

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159 We will define "regular basis" to mean exceeding the specified number of hours per week on an average basis during the preceding six months of operation.

160 See INTV Comments of March 25, 1991 at 3; Fox Comments of March 25, 1991 at 3; FBC Affiliates Comments of March 25, 1991 at 16.

161 The Commission received inadequate information in the record to develop a network definition based, at least in part, on the potentially more complex criterion of audience share. See generally FBC Television Affiliates Further Comments of March 25, 1991 at 14. Thus, while intrigued by such an approach, we have not included an audience share standard in our definition.

reach, these entities should be considered "networks" and be subject to these rules.[162]

B. Transition Rules

159. An important goal in this proceeding is to encourage the development of emerging networks. Indeed, promoting establishment of a fourth or even fifth national network has been a consistent interest of the FCC for many years.[163] We find that new networks will provide an increase in the amount and diversity of prime time entertainment programming that will ultimately benefit the public and lessen the need for future regulation of broadcast networks. Among the most likely candidates to develop an emerging network are companies that control both production or syndication entities and broadcast stations in some of the larger television markets. In order to promote an orderly transition to compliance with our revised requirements, we proposed to "grandfather" program ownership rights obtained by emerging networks prior to reaching the network definition threshold and to allow a maximum of 36 months to bring prior contracts into full compliance with PTAR.

Comments

160. DOJ claims that any remaining rules should apply to rights acquired after an entity meets the new definition.[164] Although Fox affiliates express preference for complete repeal of the rules, they favor a three-year transition if restrictions are applied to network syndication activity. They also request that the Commission include a "remaining term of contract" provision for PTAR compliance to parallel the financial interest and syndication rules transition and to protect property rights of affiliates. Fox affiliates warn that premature application of PTAR would cause costly alteration of scheduling, force stations into the market to find high-quality substitutes on short notice, reduce future bidders for off-network programming, and create disincentives for non-Fox independents to affiliate with new networks.

161. In addition, MAP/UCC argues that the Commission failed to foresee that the success of its rules would create additional networks that might emerge into "major" network status. Specifically, they fear that premature application of these rules might interfere with evolving distribution arrangements and could cause severe dislocation to an emerging network and its new affiliates, formerly independent stations that have long been the

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162 See Appendix B (attached) at Section 73.662 (i). See also Christian Broadcasting Network, 87 FCC 2d 1076 (1981) and Home Shopping Inc., 4 FCC Rcd 2422 (1989).

163 See e.g.; Network Inquiry Special Staff, New Television Networks: Entry, Jurisdiction, Ownership, and Regulation (October 1980, Volume I at 27). Competition and Responsibility in Network Television Broadcasting, 25 FCC 2d at 333 (1970).

164 DOJ Comments of March 25, 1991 at 8.

beneficiaries of these rules. Therefore, MAP/UCC urges that we allow for a gradual application of the rules to Fox and other emerging networks over the course of two to three years.[165]

162. NBC objects that the transition period would allow Fox to escape regulations and exploit its vast program library in syndication, thereby undermining the Commission's stated concerns about warehousing and affiliate favoritism, and ignoring the fact that networks were forced to divest syndication interests in 1970. Similarly, network affiliates express concern that Fox affiliates may unfairly obtain relief from PTAR limitations upon network programming during the access period despite becoming formidable competitors in local markets. NBC also warns that the 36 months allowed for full compliance with the rules would likely become an indefinite waiver if the rules also include a provision for review after four years.

Discussion

163. We recognize that compliance with our revised rules may cause some hardships to emerging networks upon meeting our definitional threshold. Nonetheless, we feel it is important that all broadcast networks operate under the same set of rules. Fox and other potential emerging networks will be aware of the benchmarks for network status. Any entity reaching these criteria can be expected to have a significant ability to engage in extraction or manipulation of the syndication market.

164. Of course, we are concerned that an immediate cessation of former financial interest and syndication activities may be perceived as too high a price for becoming a network.[166] We recognize that new networks may have entered into programming and syndication contracts which not only affect programming on their own network, but may involve contractual relations with other networks. Therefore, we have determined that the most desirable course is to require that a "new" network immediately come into compliance with respect to pipeline or future programs which the network was not already producing or distributing on the date it reached the definition threshold. Any program ownership rights, including financial interests and syndication rights, obtained by a new network prior to meeting our network definition shall be "grandfathered." A new network and its affiliates also shall be allowed a maximum of 36 months to bring pre-existing contractual arrangements into full compliance with the prime time access rule. New networks are otherwise required to comply immediately with these rules, in particular as to any program ownership rights obtained subsequent to becoming a "network."

165. Thus, under the new transition and grandfathering scheme, a new network will not be required to cease producing or distributing programs that were already on its own network or a competing network. The new networks, however, will be on notice that any future program acquisitions will have to be made in compliance with our new financial interest and syndication rules.

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165 Comments of MAP/UCC of November 21, 1990 at 7, 10-11.

166 See Fox Broadcasting Company Comments of March 25, 1991 at 3.

166. We find that these restrictions are necessary to treat all networks equally and to accomplish our policy objectives. In this regard, the transitional rules will reduce some of the hardships and costs to emerging networks, but will not give such networks an advantage in perpetuity. We believe that our goal of increasing the number of competitive networks and our recognition that established networks may have an advantage in terms of outlets and market power adequately balance any competitive concerns during this transitional period.

167. Consistent with our rules for network programming, we further find that there should be a reasonable period of time allowed for transition from non-network to network status with respect to first-run syndication programming. To provide an orderly transition, we determine that first-run programming should be grandfathered in order to allow new networks to continue with existing contractual arrangements with local broadcast stations.

168. In light of our concern for preservation of the prime time access rule and its policy objectives, however, we find that first-run syndicated programming carried during the access period will be grandfathered only for the life of the programs or three years, whichever occurs first. We find that permitting new networks unlimited syndication rights during the access period would undermine PTAR by allowing the new network to program in excess of the allowable prime time hours for network and off-network programming. We believe, however, that a maximum period of three years is an appropriate length of time for the network and its affiliated stations in the top 50 markets to come into compliance with PTAR without damaging the policy goals behind this rule. This transition should permit the Commission to ensure compliance with our PTAR goals and not cause major disruptions in the first-run market.

169. We further find that network affiliated stations in the top 50 markets will be permitted to burn-off programming contracts for programs scheduled during the access period. These affiliates will, however, be limited to either the length of the existing contract or three years, whichever occurs first. We find that the above-stated reasons for permitting a transition for an emerging network apply equally to their affiliates. We believe that these stations, the parties with whom they have legitimately contracted, and the public are better served by an orderly transition rather than an immediate requirement preventing broadcasts of these programs during the prime time access period. Furthermore, affiliates of other networks should not experience any newly created detriment since the new network's affiliates would have aired the programming during the prime time access period prior to reaching "network" status.

X. REPORTING REQUIREMENTS

170. Because existing rules generally prohibit network acquisition of program rights and network participation in syndication activities, the networks currently are not required to submit information to the Commission about any involvement in such business ventures. However, in view of our

proposals in this proceeding to relax the financial interest and syndication restrictions in large measure, we sought comment on whether we should impose reporting requirements on networks to help monitor any new network activities in previously prohibited areas. For the reasons discussed below, we conclude that the networks should be subject to limited reporting requirements.

Comments

171. Parties generally expressed support for some form of reporting requirements, except King World, which stated that such requirements would be useless because the only enforcement would be after-the-fact. The Fox Affiliates generally endorse reporting requirements as a desirable corollary safeguard, and the FTC believes that the information collected could be useful to resolve the underlying policy debate in our future review of the rules. NBC prefers an annual rather than semi-annual reporting requirement, which it argues would be sufficient for monitoring compliance and assessing problems without requiring unnecessary paperwork and record-keeping. NBC also prefers filing any information with the Commission instead of maintaining records at its O&Os, noting that it is the public and the Commission, rather than its individual O&O station viewers, that require access to the information. NBC also requests that any requirement to file contracts be done under a grant of confidentiality unless the Commission concludes in a specific case that there are significant public interest considerations for making the contractual provisions public.

172. INTV suggests additional details to be included in reporting requirements, including specifically requiring each network to compile, file, and regularly update a complete report on their involvement in program production, acquisition of financial interests and syndication rights, and participation in the syndication or distribution of programming, including the "syndication trail" of any program in which the network owns an interest. Finally, MAP suggests that the networks be required to make reports contemporaneously with their actions, that the networks not be permitted to reconstruct such reports, and that the reports be submitted to the Commission and the Commission be required to subject them to staff review.

Discussion

173. In order to monitor the networks' behavior under our new rules, we are imposing certain reporting requirements. We will require each network to maintain a semi-annual report in its owned and operated stations' public files. In these reports, a network must first certify its compliance with the Commission's rules. In particular, a network must certify in each instance that the acquisition of any rights in an outside production or a producer-initiated in-house production were not obtained as a condition of network licensing or airing of the program.[167] Second, each report must list, for the preceding 180-day period: (1) all in-house productions that have aired on any

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167 Such certification shall be executed by the network official entering into the agreement with the producer on a form provided by the Commission.

network's prime time entertainment schedule; (2) the domestic syndication record of its in-house programs that have aired on any network prime time entertainment schedule; and (3) all prime time entertainment programs in which the network holds a financial interest or syndication rights. The networks will also be required, upon Commission request, to make available for review a copy of any program contracts. These reports shall be placed in the public file before the first regular business day of September and March of each year.

174. We conclude that these reporting requirements will deter possible anticompetitive behavior by the networks and will assist the Commission and interested parties in confirming network compliance with our modified financial interest and syndication rules. In addition, the information submitted in the networks' semi-annual reports will enable the Commission to monitor the efficacy of its various safeguards and to oversee the networks' conduct in the program acquisition and syndication markets. This information will also form the basis for our future review of the rules.

XI. REVIEW OF RESIDUAL RULES

Comments

175. The Coalition, INTV, Westinghouse, and King World generally favor review of the rules after four years. INTV would mandate review in five, rather than four, years because it believes that the off-network programs that would be subject to the new rules are unlikely to be syndicated until the fall of 1995 at the earliest, and therefore four years is insufficiently long for this purpose, although it does recognize that the effects of the rules on other than the availability of syndicated programming to independent stations might be assessed after fewer than five years. DOJ finds a four-year review period "attractive" because reassessment of the rules will be necessary due to the rapid and significant changes in the marketplace.

176. ABC urges that the rules be declared experimental and that based upon present trends their demise in four years is anticipated. Similarly, NBC urges a decision now to eliminate the rules in four years or, at a minimum, a commitment to complete a review in four years with a presumption that the rules would be repealed, arguing that any abuses will be apparent and that restricting the networks into the indefinite future unnecessarily risks "grave consequences."

Discussion

177. After careful consideration of the voluminous record in this proceeding, including the testimony of the interested parties at the Commission's en banc hearing and the market data and analysis compiled by the parties and the Commission's own staff, we find that the significant deregulation of network ownership and syndication of prime time entertainment programs detailed in this Order best serves the public interest. Specifically, this set of residual rules will enable the networks to become profit

participants in the ancillary rights to their entire program schedule and to syndicate actively, both at home and abroad, all programming other than prime time entertainment as well as a broadly defined class of prime time in-house productions. At the same time, the public interest in a diversity of programming sources and outlets will be protected through narrowly targeted safeguards.

178. Although some parties to this proceeding have argued that any remaining financial interest and syndication rules should be subject to a "sunset" provision, or phased out within a set number of years if certain conditions are met, the Commission believes that such a result would be undesirable for a number of reasons. Most importantly, because the record does not currently support total repeal of the rules, adopting sunset mechanisms or presumptions would attempt to forecast events that are inherently unpredictable.[168] Further, given the public interest values at stake, including the very viability of independent producers and independent stations, the intricate workings of the program acquisition and syndication markets under these new rules need to be fully reviewed and analyzed by the Commission at a future point, not arbitrarily dictated now.

179. We fully recognize that these are industries in transition. In particular, the significant marketplace changes of the past decade may continue, further increasing the number of programming outlets and the competition to networks in their acquisition of prime time entertainment programming. Therefore, we are scheduling a review of these modified financial interest and syndication rules commencing four years after the effective date of this Order.[169] If, in the Commission's judgment, market conditions at the time of that review are sufficient, these rules may be repealed.

XII. EFFECTIVE DATE AND PROCEDURAL MATTERS

180. The rules the Commission adopts today shall take effect 30 days after publication of this Order in the Federal Register, and shall be enforced prospectively from that date. Thus, the rules with respect to network acquisition of rights (financial interests and domestic and/or foreign syndication rights) in outside productions and in-house domestic co-productions shall apply only to new series or other new prime time entertainment programs originally licensed by the network on or after the effective date.

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168 See Comments of MAP/UCC of November 21, 1990 at 4-6 (arguing that sunsetting the rules lacks factual and legal support).

169 DOC also suggested that the Commission revisit any revised rules within three to five years of their adoption for similar reasons. DOC Reply Comments of August 1, 1990 at 41.

181. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need for and purpose of this action

182. The Commission relaxes the financial interest and syndication rules to reflect changes in the video marketplace. That marketplace has changed, for example, in the following ways: (1) The three major networks have lost a proportion of the total television audience; (2) A flourishing cable industry has emerged; and (3) The fundamental objectives the Commission sought to advance when it promulgated the rules -- to foster a robust syndication industry and to prevent network extraction of rights from non-network producers -- have largely been achieved. Although the record in this proceeding does not, in our judgment, support total repeal of the rules, it does support significant deregulatory relief for the networks, subject to structural and behavioral safeguards against potential harm to the outside program producers, the program distributors, and the local broadcasters who are so critical to the diversity the Commission seeks to promote and preserve.

183. The Commission has thoroughly considered the issues and the impact its decision will have on the multitude of parties in the domestic and global video marketplace. We have chosen to adopt policies whose purpose is to focus on those points in the video marketplace where diversity is most at risk and to apply the rules primarily at these points, while striving to relax the rules at other points where diversity is not so much at risk. The overall effect is deregulatory, designed to enhance the ability of existing and emerging networks to compete effectively in, but not unfairly dominate, the changed and changing video marketplace.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis

184. No issues or concerns were raised specifically in response to the Initial Regulatory Flexibility Analysis. Several commenters favored permitting the three national networks to acquire financial interest in and engage in domestic and foreign syndication of programming. Some parties, however, expressed concern that repeal of the financial interest rules would enable networks to condition access to the network schedule on the extraction of syndication rights from independent producers for less than fair market value. Some parties also expressed concern that, if they controlled syndication rights, the networks might withhold, or warehouse, some programming from the syndication market or offer such programming to independent stations under less favorable terms than those offered to network affiliates, all to the detriment of independent television stations.

III. Significant alternatives considered and rejected

185. The Commission considered retaining the current rules or retaining them but with an exception for emerging networks, but found that retention would entail forfeiture of some of the beneficial objectives sought in the rule making, and would represent unnecessary government intrusion into the workings of the marketplace. Additionally, the Commission considered repealing both the

financial interest and syndication rules either with or without a transition period, but the record in the proceeding does not provide an adequate case for total repeal of the rules. Given the public interest values at stake, including the very lifelines of the independent producers and the independent stations, the intricate workings of the program acquisition and syndication markets under these new rules need to be fully evaluated by the Commission at a future point, not arbitrarily dictated now. Therefore, a review of the modified rules will be commenced at a date certain four years after their effective date. If, in the Commission's judgment, market conditions at the time of that review are sufficient to warrant repeal, these rules may be repealed.

186. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose some new or modified reporting and recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and recordkeeping requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act. (Public Law 96-511, 47 U.S.C. 3507).

187. The Secretary shall cause a copy of this Report and Order to be sent to the Chief Counsel for Advocacy of the Small Business Administration.

188. Accordingly, **IT IS ORDERED** that under the authority contained in Sections 4(i), 301, 303(b), (f), (g), (i), and (j), 307(d), 308(b), 309(a), 310, 312, 313, and 314 of the Communications Act of 1934, as amended, Part 73 of the Commission's rules and regulations **IS AMENDED** as set forth in the attached Appendix B. The rules will go into effect 30 days after publication of this Report and Order in the Federal Register, except for the paperwork requirements contained in Sections 73.661 and 73.3526 (which are subject to approval by the Office of Management and Budget, and which will go into effect no later than 60 days after publication).

189. **IT IS FURTHER ORDERED** that this proceeding **IS TERMINATED**.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Appendix A

List of Commenters

Commenters responding to the Notice of Proposed Rule Making

Initial Comments

1. ABC Television Affiliates Association
2. Action for Children's Television
3. Association of Independent Television Stations, Inc.
4. Capital Cities/ABC, Inc.
5. Joint comments of Capital Cities/ABC, Inc., CBS Inc. and National Broadcasting Company, Inc.
6. CBS Inc.
7. Joint comments of Chris-Craft/United Television Station Group, Gaylord Broadcasting Company, Tribune Broadcasting Company, Channel 50 TV Corp., and MCA Broadcasting Inc.
8. Coalition to Preserve the Financial Interest and Syndication Rule
9. FBC Television Affiliates Association
10. Fox Broadcasting Company
11. ICF Consulting Associates (On behalf of The Coalition to Preserve the Financial Interest and Syndication Rule)
12. KCAL-TV
13. Malrite Communications Group, Inc.
14. Media Access Project and the Office of Communication of the United Church of Christ
15. National Broadcasting Company, Inc.
16. National Economic Research Associates, Inc.
17. NATPE International
18. NBC Television Affiliates
19. Pappas Telecasting Companies
20. Program Producers and Distributors Committee
21. United States Department of Justice
22. Westinghouse Broadcasting Company, Inc.

Reply Comments

1. ABC Television Affiliates Association
2. Association of Independent Television Station, Inc.
3. Caucus for Producers, Writers & Directors
4. Capital Cities/ABC, Inc.
5. Joint Economic Appendix of Capital Cities/ABC, Inc., CBS Inc. and National Broadcasting Company, Inc.
6. CBS Inc.
7. CBS Television Network Affiliates Association
8. Joint comments of Chris-Craft/United Television Station Group, Gaylord Broadcasting, Tribune Broadcasting Company, Channel 50 TV Corp. and MCA Broadcasting Inc.
9. Coalition to Preserve the Financial Interest and Syndication Rule

10. Economic Policy Institute
11. FBC Television Affiliates Association
12. Federal Trade Commission, Staff of the Bureau of Economics (late-filed)
13. Fox Broadcasting Company
14. Hearst Corporation
15. ICF Consulting Associates
16. KCAL-TV
17. The Media Institute
18. Modal Logic Corp.
19. National Broadcasting Company, Inc. (Further Comments filed July 24, 1990)
20. National Broadcasting Company, Inc.
21. National Economic Research Associates, Inc.
22. National Telecommunications and Information Administration
23. NATPE International
24. NBC Television Affiliates
25. Orbis Communications Inc.
26. Program Producers and Distributors Committee
27. Television Operators Caucus Inc., Board of Directors
28. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (late-filed)
29. United States Department of Justice (late-filed)
30. Writers Guild of America, West, Inc. (late-filed)

Commenters responding to the Further Notice of Proposed Rule Making

Initial comments

1. Action For Children's Television, Et Al. (Geller/Lampert)
2. Association of Independent Television Stations, Inc. (INTV)
3. Capital Cities/ABC Inc.
4. CBS Affiliates
5. CBS, Inc.
6. Coalition to Preserve the Financial Interest and Syndication Rule
7. FBC Television Affiliates Association
8. Fox Broadcasting Company
9. Independent Stations (The Chris Craft/United Television Station Group, Gaylord Broadcasting Company, Tribune Broadcasting Company, and Channel 50 TV Corp.)
10. King World Productions, Inc.
11. Media Access Project and Office of Communication of the United Church of Christ
12. NATPE International
13. National Broadcasting Company, Inc.
14. National Economic Research Associates, Inc.
15. National Telecommunications and Information Administration (NTIA)
16. Pappas Telecasting Companies
17. Program Producers and Distributors Committee
18. Walt Disney Company
19. Westinghouse Broadcasting Company, Inc.

Reply Comments

1. ABC Television Affiliates Association
2. Association of Independent Television Stations, Inc. (INTV)
3. Capital Cities/ABC Inc.
4. CBS, Inc.
5. Coalition to Preserve the Financial Interest and Syndication Rule
6. Fox Broadcasting Company
7. FBC Television Affiliates Association
8. Federal Trade Commission - Staff of the Bureau of Economics
9. HSN Communications, Inc.
10. Independent Stations (The Chris Craft/United Television Station Group, Gaylord Broadcasting Company, Tribune Broadcasting Company, and Channel 50 TV Corp.)
11. King World Productions, Inc.
12. Media Access Project and Office of Communication of the United Church of Christ
13. National Broadcasting Company, Inc.
14. Program Producers and Distributors Committee
15. Station Representative Association, Inc.
16. U.S. Department of Justice

Parties participating in the en banc hearing

Daniel Burke (ABC)
Robert Daly (Time-Warner)
Barry Diller (FBC)
Richard Frank (Walt Disney)
Laurence Tisch (CBS)
Robert Wright (NBC)
William Brock (on behalf of CBS)
Jack Valenti (MPAA)
Clyde Prestowitz (on behalf of NBC)
Leonard Hill (Leonard Hill Productions)
John Agoglia (NBC)
Stephen Cannell (Stephen J. Cannell Productions)
Robert Iger (ABC)
Jerry Leider (Caucus of Writers, Producers & Directors)
Barry Meyer (Warner Brothers)
Jeff Sagansky (CBS)
Ralph Baruch (Program Producers and Distributors Committee)
Al DeVaney (INTV)
Michael Fisher (FBC Television Affiliates)
Mel Harris (Paramount TV)
Leroy Paul (American Family Broadcast Group)
Ethan Podell (Orbis Productions)
Stephen Weiswasser (ABC)
Thomas Carter (Justice Productions)
Brandon Stoddard (ABC)
Harry Pappas (Pappas Telecasting Companies)
Marian Rees (Marian Rees Associates)
Andrew Schwartzman (Media Access Project)
Henry Geller (Action for Children's Television)

William Kerr (on behalf of INTV)
Harry Shooshan (on behalf of FBC)
Lawrence Summers (on behalf of ABC, CBS and NBC)
Frederick Warren-Boulton (on behalf of the Coalition to Preserve FISR)

Commenters responding to the Order Requesting Further Comment

1. ABC Television Affiliates Association
2. Capital Cities/ABC, Inc.
3. CBS Television Network Affiliates Association
4. CBS Inc.
5. Citizens for a Sound Economy Foundation
6. Coalition to Preserve the Financial Interest and Syndication Rule
7. United States Department of Justice
8. Federal Trade Commission Staff of the Bureau of Economics
9. FBC Television Affiliates Association
10. Fox Broadcasting Company
11. Heritage Foundation
12. HSN Communications, Inc.
13. Association of Independent Television Stations, Inc.
14. Joint Comments of Chris-Craft/United Television Station Group, Tribune
15. King World Productions, Inc.
16. Malrite Communications Group, Inc.
17. Media Access Project, Office of Communication of the United Church of Christ, Foundation for Independent Video and Filmmakers, Arizona Consumers Council, Association of Community Organizations for Reform Now (Acorn) and Congress Watch
18. NBC Television Affiliates
19. National Broadcasting Company, Inc.
20. Program Producers and Distributors Committee
21. Westinghouse Broadcasting Company, Inc.
22. McKinnon Broadcasting Company

APPENDIX B

Part 73 of Title 47 of the Code of Federal Regulations is amended to read as follows:

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. Section 154, 303

2. Section 73.658 is amended by deleting paragraph (j) and marking it "reserved" and adding a new Note 3 and 4 to read as follows:

Section 73.658 Affiliation agreements and network program practices; territorial exclusivity in non-network program arrangements.

(a) * * *
(j) reserved
(k) * * *

Note 3: Programming distributed by an entity prior to becoming a network, and subsequently produced episodes of a series first exhibited by that entity prior to becoming a network, are not network programming for purposes of this paragraph or Sections 73.659 - 73.662 of these rules.

Note 4: For thirty-six (36) months after an entity becomes a network, stations owned by or affiliated with that network are exempt from compliance with the requirements of this paragraph with respect to programming already under contract at the time the entity became a network.

3. A new Section 73.659 is added to read as follows:

Section 73.659 Television network financial interests and syndication rights in programs.

(a) No television network may hold or acquire continuing financial interests or syndication rights in any prime time entertainment program or series exhibited on its network unless such interests or rights are held or acquired under one of the following circumstances:

(1) The program or series is solely produced by the network;

(2) The program or series is a co-production between the network and a foreign production entity;

(3) The program or series is a co-production between the network and a domestic production entity where such co-production arrangement (i) was initiated, in writing, by the outside production entity and (ii) does not become binding on the outside production entity until thirty (30) days after it is executed;

(4) The interests or rights in a program or series are acquired from an outside producer through negotiations commencing no earlier than thirty (30) days subsequent to the execution of any network license fee agreement for that program or series.

(b) No television network may hold or acquire continuing financial interests or syndication rights in any first-run non-network program or series distributed in the United States unless the network has solely produced that program or series.

(c) No more than forty (40) percent of a television network's total prime time entertainment programming schedule during a programming year shall consist of programming in which the network holds or acquires continuing financial interests or syndication rights pursuant to paragraphs (a)(1), (a)(2), or (a)(3) above.

4. A new Section 73.660 is added to read as follows:

Section 73.660 Television network participation in program syndication.

(a) No television network may syndicate any prime time entertainment program to television stations within the United States: 1) the syndication rights to which have been acquired pursuant to the provisions of Section 73.659(a)(4); or 2) that has not previously been aired on its network. Such programs shall be syndicated domestically through an independent syndicator.

(b) No television network may syndicate prime time entertainment programs to any station with which it is affiliated on terms or conditions that are more favorable than those offered to other nonaffiliated stations. Favoritism shall be rebuttably presumed if productions in which a network has an interest are syndicated to network owned or affiliated stations in more than thirty (30) percent of the markets where the program has been sold.

(c) Where a television network has syndication rights in prime time entertainment programming, such programing shall be made available for non-network broadcast exhibition within the United States no later than the earlier of: 1) the end of the fourth year after network exhibition of such a series has commenced, or the subsequent anniversary of that date as to all programs in that series aired after the fourth year, or 2) one hundred eighty (180) days after network exhibition of such a series or program is completed.

5. A new Section 73.661 is added to read as follows:

Section 73.661 Network television program ownership and syndication reports

(a) A television network shall maintain reports identifying prime time television entertainment programming exhibited on any television network in which the network holds or acquires financial interests or syndication rights. Any agreements containing such rights shall be made available to the Commission upon its request.

(b) Each television network shall maintain reports identifying all programs that the network has syndicated, and shall list therein all stations within the United States to which syndicated program sales have been made by the network. Any agreements entered into in connection with such syndication sales shall be made available to the Commission upon its request.

(c) Each television network shall, with respect to each program or series in which rights have been obtained pursuant to Section 73.659(a), certify in writing on the specified form that no financial interests or syndication rights were obtained as a condition of network licensing or airing of the programs, and verify compliance with the provisions of Section 73.659.

(d) The records maintained pursuant to paragraphs (a), (b), and (c) above shall be placed in the public file of each station owned by the network before the first regular business day of September and March of each year. These records shall be maintained in the public file for a period of five years and made available to the Commission upon its request.

6. A new Section 73.662 is added to read as follows:

Section 73.662 Definitions for television network financial interest, syndication, and prime time access rules.

For purposes of Sections 73.658(k), 73.659, 73.660, and 73.661:

(a) a "continuing financial interest" is a right to receive revenue from the non-network broadcast or syndicated use of a television program by a network.

(b) a "co-production" is a program in which copyright ownership, financial responsibility, and business and production control are shared.

(c) an "domestic production entity" is a production entity registered to do business in the United States that is not owned or controlled, in full or in part, by the television network with which it seeks to co-produce.

(d) "entertainment programs" include series, made-for-television movies, mini-series, and entertainment specials, and do not include sports, public affairs, or news programs.

(e) a "foreign production entity" is a production entity that is registered to do business and is located outside of the United States.

(f) an "independent syndicator" is one not owned or controlled, in full or in part, by a television network.

(g) a "prime time" program is one that has network exhibition during the hours of 7-11 p.m. eastern and pacific time or 6-10 p.m. central and mountain time.

(h) a program "solely produced by a network" is a program in which the network is the sole copyright owner, has full financial responsibility, and full business and production control.

(i) a "television network" is any person, entity, or corporation providing on a regular basis more than fifteen (15) hours of prime time programming per week (exclusive of live coverage of bona fide news events of national importance) to interconnected affiliates that reach, in aggregate, at least seventy-five (75) percent of television households nationwide; and/or any person, entity, or corporation controlling, controlled by, or under common control with such person, entity, or corporation. Not included within this definition is any television network formed for the purpose of producing, distributing, or syndicating program material for educational, noncommercial, or public broadcasting exhibition, or for non-English language exhibition, or that predominately distributes programming involving the direct sale of products or services.

Note: "National audience reach" for purposes of this definition is the total number of United States television households in the Arbitron Area of Dominant Influence (ADI) markets in which the stations or regular television station affiliates of the network are located, divided by the total national television households as measured by the most current ADI data publicly available at the start of each television season. "Regular basis" means providing, on average for the prior six months, more than the specified number of hours of programming per week.

(j) a "television programming year" commences on the first day of September and ends on the last day of August the subsequent year.

7. Section 73.3526 is amended by adding a new subparagraph (a)(11) to read as follows:

Section 73.3526 Local public inspection file of commercial stations

(a) * * *

(a)(11) Every television broadcast station owned or controlled by a television network shall maintain the records required by Section 76.661. These records shall be maintained in the file for a period of five years.

TELEVISION NETWORK FINANCIAL INTEREST AND SYNDICATION RULE COMPLIANCE

CERTIFICATION FORM

The acquisition of financial interest and syndication rights by television networks are subject to rules and regulations of the Federal Communications Commission.

This will certify: (1) that I am familiar with the provisions of these rules; and (2) that, in acquiring rights in

_____,
(insert name of program)

_____ has complied with the
(insert name of network)

requirements of these rules to the best of my knowledge and belief; and (3) that no financial interest or syndication rights were obtained as a condition of network licensing or airing of this program.

Signature of Network Official
Printed Name and Title
Date

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE OR IMPRISONMENT (18 U.S.C. CODE SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(1)) AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

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Dissenting Statement of Chairman Alfred C. Sikes

In the Matter of Evaluation of the Syndication and Financial Interest Rules

When the Commission revised its prime time access rules sixteen years ago Commissioner Glen Robinson dissented, observing that "The Commission's continued struggle with 'network dominance' has been an adventure fully worthy of Don Quixote ... as often as not it has missed the giants and jousted with windmills." [1]

A generation later the Commission again sallies forth to do battle with the issue of network dominance, this time in the context of adopting a restrictive new set of financial interest and syndication rules. I write in dissent today because the majority sees giants where there are none, and tilts with windmills instead.

Purpose of the Rules

The Commission adopted the financial interest and syndication rules in 1970 to prevent television networks from extending their power in the program buying market into the program production market and thereby excluding independent producers from the latter market. The Commission's concern was that the networks were hindering competition in the program production market by exploiting their affiliate relationships, refusing to deal with independent producers unless they gave up financial interests and syndication rights in their programs to the networks, and favoring programs in which the networks held financial interests. [2]

The Commission found that increased network control over program production and an ensuing reduction in independently-supplied programs were contrary to the public interest in competition and program diversity. [3] The rules were intended to reduce the networks' bargaining leverage. This, it was hoped, would increase the number of independent producers in the network television program market, improve their bargaining positions with the networks and thereby enlarge the sources of network programs, and eliminate the ability of networks to bootstrap

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[1] Second Report and Order in Docket No. 19622, dissenting statement of Commissioner Glen O. Robinson, 50 FCC 2d 829, 889 (1975).

[2] Report and Order in Docket No. 12782, 23 FCC 2d 385, 387-97 (1970).

[3] Id. at 394-5.

their affiliate relationships into an advantage in the syndication market. [4]

Almost as soon as they were adopted the rules came under fire. [5] One study of both the rules and the market conditions that prompted their adoption showed that there was no evidence of undue network power in the purchase of programs. [6] Another showed that the networks paid market value for the purchase of syndication rights, and made programming decisions without regard to whether they held a financial interest or not. [7] Yet another showed that because the program production market is easy to enter and has many actual and potential players, program production would respond to demand even without the rules. [8]

These studies led the Commission to conclude in 1977 that the rules needed a thorough reappraisal. In the course of that reappraisal the Commission established a special investigative staff of non-partisan legal, economic, and other experts called the Network Inquiry Special Staff. The Network Inquiry Special Staff worked for two years and prepared a comprehensive two-volume report that constitutes the most authoritative examination of the development and supply of network programs ever undertaken. In the course of this work the Special Staff conducted detailed studies of network behavior toward affiliates, advertisers and program suppliers and examined the factors

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[4] Id. at 318-332.

[5] See Tentative Decision and Request for Further Comments in BC Docket No. 82-345, 94 FCC 2d 1019, 1092-93 (1983) (hereinafter, 1983 Tentative Decision).

[6] Crandall, R.W., "FCC Regulation, Monopsony, and Network Television Program Costs," 3 Bell Journal of Economics, 483-508 (1972).

[7] Crandall, R.W., "The Economic Effect of Television Network Program 'Ownership,'" 14 Journal of Law and Economics 385-432 (1971).

[8] B.M. Owen, J.H. Beebe, and W.G. Manning, Jr., Television Economics (D.C. Heath and Company, Lexington, Mass. 1974), 28-31. See also Schuessler, "FCC Regulation of the Network Television Program Procurement Process: An Attempt to Regulate the Laws of Economics," 73 Northwestern U.S.L.R. 227 (1978); Noll, Peck and McGowan, Economic Aspects of Television Regulation (Brookings Institution, Washington, D.C., 1973).

influencing the profitability of television stations. [9] It also specially examined the issue of "network dominance," interviewing numerous participants in the process and examining the contract files for a large number of network programs. [10]

Based on this information, which was released for public comment, the Report agreed with previous research, concluding that the rules were based on incorrect perceptions of the nature of the economic markets involved, were ineffective in accomplishing their stated goals, and should be eliminated. On the sensitive issue of the networks' exploitation of their market power to extract financial interests and syndication rights from program producers, the Network Inquiry Staff Report found that

> Such allegations should not be of concern to the Commission, for they raise only the question whether program suppliers have been sufficiently compensated for their work. The networks, even if exercising complete monopsony power, cannot pay less for a program than the value the suppliers' resources have in their best alternative use. Once it is understood that networks, no matter how powerful, cannot purchase programs at rates that are unprofitable for suppliers, contentions that contract terms harm suppliers can be seen for what they are -- allegations that suppliers are not paid as much as they would prefer. Most importantly, the public interest -- the interest of viewers in receiving numerous, diverse, quality programs from which to choose -- is not implicated by such contentions. [11]

Based upon this Report the Commission instituted new rule making proceedings in 1982 to evaluate the Report's conclusions. After compiling a voluminous record of public comment, the Commission in 1983 found that

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[9] Network Inquiry Special Staff Final Report; New Television Networks: Entry, Jurisdiction, Ownership and Regulation, October 1980, Vol. 1, p.3 (hereinafter, Network Inquiry Staff Report).

[10] Joint Comments of Capital Cities/ABC, Inc., CBS Inc. and National Broadcasting Company, Inc. at 35-38 (hereinafter Joint Network Comments).

[11] Network Inquiry Staff Report, Vol. II, p. 793.

> ... the earlier criticisms of the rules, in terms of their impact on network/supplier relationships, were essentially correct... [W]e have found no credible evidence that the rules have fostered the development of first-run syndicated programming or have increased the diversity or competitiveness of the program supply market.... Finally, we do not believe that the Commission has a proper role to play in allocating revenues or profits between the networks and those who supply programming for network use.... As long as program supply markets remain competitive, and it is undisputed that they were competitive before the rules were adopted and remain competitive today, the possibility of rules of this type lifting profit levels among the program suppliers and packagers above the normal competitive level is remote. [12]

Thus, in adopting a comprehensive new set of financial interest and syndication rules that are in certain critical aspects even more restrictive than the old rules, the majority is steering into the teeth of a two-decade old gale that blows strongly the other way. However, even if the majority were to totally ignore these prior studies and the Commission's own prior findings, the record in this proceeding, standing alone and fairly evaluated, clearly undermines both the need for and efficacy of such rules. Despite the clarity of this record the majority, like Quixote, cannot believe that the giants it seeks to quell are illusory, and even the windmills it battles with are not what the majority thinks they are.

Promoting Diversity by Restricting Competition

The first question the majority must answer is a formidable one: how in theory to justify the severe restraints the new

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[12] Id. at 1095. The 1983 Tentative Decision was never finally adopted by the Commission. Nevertheless it and the Network Inquiry Staff Report, as well as the earlier studies of the rules, are all referenced and discussed extensively in the record of this proceeding. See, e.g., Joint Network Comments at 35-61; Robert W. Crandall,"The Economic Case Against the FCC's Television Network Financial Interest and Syndication Rules," prepared for submission with Joint Network Comments; and Lawrence W. Summers, "The Economic Consequences of the Financial Interest and Syndication Rules Governing the Television Networks," prepared for submission on behalf of NBC with Joint Network Comments.

rules impose on three networks' [13] abilities to compete in the production, financing, and syndication of prime time programming? The majority resolves this issue by cloaking these competition-restricting rules in our "programming diversity mandate."

This approach is a fundamental misunderstanding of, and a radical departure from, the regulatory principles followed by this Commission for over twenty years. Time and again over the last decade, the Commission has furthered the aim of increased diversity in broadcast programming by allowing free competition in the broadcast marketplace. [14] Time and again the Commission has found that diversity in a competitive mass media environment is furthered by removing regulatory restraints, not by erecting new ones. [15] One need look no further back than last year when the Commission unanimously endorsed competition, not regulation, as the best way to achieve the pro-diversity aims of the Cable Act. We officially reported this finding to the Congress, stating unequivocally that, "this Commission steadfastly believes that robust competition will more efficiently provide... a greater diversity and choice than any web of rules and regulations designed to mimic competition or otherwise compensate for its absence." [16]. As the Department of Justice observes in

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[13] Throughout this statement reference to "networks" means, unless otherwise indicated, ABC,CBS, and NBC, since these are the only three networks to which the Commission has decided its rules should apply. Although ABC, CBS, and NBC will bear the immediate brunt of these rules, the Fox Network and any other new national broadcast networks that might develop will be constrained to broadcast fewer than 15 hours per week of prime-time programming to avoid the rules' effects.

[14] Subscription Television Service, 90 FCC 2d 341 (1982); Direct Broadcast Satellite Service, 90 FCC 2d 676 (1982); Low Power Television Service, 51 RR 2d 476 (1982); FM "Drop-Ins", 94 FCC 2d 152 (1983); Multichannel Multipoint Distribution Service, 54 RR2d 107 (1983).

[15] Radio Deregulation, 84 FCC 2d 968 (1979); TV Deregulation, 98 FCC 2d 1076 (1984); Fairness Doctrine Report, 102 FCC 2d 143 (1985).

[16] Report in MM Docket No. 89-600, 5 FCC Rcd 4962, 4969 (1990).

the record of this proceeding, "It is difficult to conceive why competitive markets will not deliver the same level of diversity that proponents of the [rules] seek to achieve through [their] retention ... we find nothing in the record demonstrating that competitive markets will not perform this function." [17]

Nor is the Commission's longstanding effort to foster diversity by fostering competition aberrational. The furtherance of competition is an integral part of the Communications Act. The Supreme Court has held that, in adopting the Act, "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." [18] The Court has also found that the Communications Act intends that the field of broadcasting be one of free competition." [19] In fact, the appellate court upheld the 1970 fin/syn rules based on the proposition that, in furthering competition by enabling more sources to place shows on the networks' schedules, the rules would further diversity. [20]

The majority's evident impression is that our lack of primary jurisdiction to enforce the antitrust laws permits us to give scant weight to the effects of our rulings on competition. But that is not so. "This Commission, although not charged with the duty of enforcing [the Sherman Act] should administer its regulatory powers with respect to broadcasting in light of the purposes which the Sherman Act was designed to achieve." [21]

It is important to reemphasize that this approach in no way denigrates the notion that program diversity is an appropriate and impelling focus of Commission regulatory policy. It simply points out that in pursuing diversity by restricting competition, the majority forgets that competition and diversity are complementary regulatory goals, and stands the purpose of the Act, as well as its own recent precedent, on its head.

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17 Department of Justice Further Comments at 4.

18 FCC v Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940).

19 FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

20 Mt. Mansfield Television, Inc. v. FCC, 442 F. 2d 470, 480-486 (2d Cir. 1971).

21 NBC v. U.S., 319 U.S. 239 (1943).

Deregulating by Regulating

Notwithstanding this abrupt departure from the longstanding pro-competitive policies of the Commission, the majority attempts to wrap its competition-restricting new rules in the flag of deregulation. Whatever else can - or cannot - be said for these rules, they are not deregulatory. It is not deregulatory to impose limits on the networks' in-house production of prime time programming, especially where neither the old fin/syn rules nor the Justice Department consent decrees do so. It is not deregulatory to sit the Commission down at the negotiating table when the networks buy rights to prime time programming, and to prescribe how the negotiations may and may not be initiated and conducted. It is not deregulatory to concoct a bargaining process that virtually assures that the networks cannot get the rights that they are ostensibly permitted to bargain for. And it is not deregulatory to bar the networks from syndicating either off-network programming licensed from outside producers or first-run programming, particularly when foreign-owned, multinational Hollywood studio corporations are free to do so.

Compared to these severe restrictions on the networks' business activities, the supposed liberalizations these rules extend are minimal at best and illusory at worst. Once again, this constitutes a stunning about-face from the efforts of past Commissions, under both Republican and Democrat leadership, to remove outdated rules and to avoid imposing further unnecessary regulations.

Network Dominance

In the Tentative Decision the Commission limned the balancing of interests pertinent in reevaluating these rules:"...[R]egulations adopted or continued [should] not impose undue costs or unreasonably interfere with the efficient conduct of business, and, at the same time, that private restraints on competition not interfere with the competitive spur that keeps businesses efficient and costs reasonable. In general, this suggests that the Commission should not intervene in the market except where there is evidence of a market failure and a regulatory solution..., does not impose greater costs that the evil it is intended to remedy." [22]

The extensive record in this proceeding fails to demonstrate a market failure warranting the imposition of the singularly intrusive scheme of rules that the majority has adopted.

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22 1983 Tentative Decision at 1055.

Reduced to its essentials, what is at issue in this proceeding is the question of whether the networks have the ability to exert undue leverage over program producers in return for access to the prime time schedule in such a way that program diversity suffers as a result. The point at which the networks would exercise this leverage, if at all, would be when they negotiate the terms of their purchase of prime time programming. Therefore the critical question that must be resolved is whether the networks exercise the degree of market power in buying prime time programming that would be necessary to exert undue leverage.

The video marketplace of 1991 bears not even a superficial resemblance to the video marketplace that existed in 1970 when the rules were originally adopted. Even today's majority concedes this point. The number of television stations has grown by more than 500 since 1970, and television advertising revenues have increased from $3.6 billion to $26.9 billion. In 1970 there were only 65 independent stations; now there are 339. This expansion in the number of independent stations has provided a nucleus for a fourth television network, the Fox Network. Cable television, a negligible presence in 1970, has since become the means whereby the majority of American households view television. Cable now serves 59 percent of the national television audience, and is available to about 90 percent of it. As a result, the average American viewer can now access 30 channels of television, as opposed to 7 in 1970. Not surprisingly, yearly cable subscriber revenues have grown from $300 millon in 1970 to $16.2 billion today, and cable advertising revenues total $2.5 billion per year. It is estimated that cable revenues from local advertising and pay-per-view services will grow from 15 to 50 percent each year. The number of national cable program services has grown from zero in 1970 to 90 today. Today there are 3 million home satellite dish users and over 70 percent of American homes have VCR's; neither dishes nor VCRs were in use in 1970. [23]

Notwithstanding these transformational changes in the video market, the majority finds them insufficient to address its concerns over the networks' ability to unfairly bargain for programming. Why? because of the networks' supposedly "unique"

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[23] See, e.g., Joint Network Comments at 72-108; NBC Television Affiliates, Comments at 6; ABC Television Affiliates, Comments at 7; National Economic Research Associates Study, submitted on behalf of Fox Broadcasting, at 10 (hereinafter, Fox/NERA); Action for Childrens' Television et al., Comments at 2; NBC Supplemental Comments at 5-8, and see Variety, May 13, 1991 at 45.

hold over the nationwide television audience and thus those who seek to reach it.

The majority marshals a seemingly impressive array of factoids to buttress this proposition. There is, for example, the fact that the networks alone reach virtually all US households. There is also the fact that the networks' share of prime time viewing exceeds all cable viewing and all independent station viewing. Then, of course, there is the fact that the networks still garner about 80 percent of all national advertising revenues, and their rates are higher than those received by cable and independent stations. And finally, there is the fact that each network continues to spend twice what all the cable networks combined spend on entertainment programming. Put these facts together and, in the majority's eyes anyway, they spell undue power in purchasing programming.

I would not, for one moment, expend inordinate effort to dispute any of those facts. [24] Even if each were true, they would still be totally irrelevant to the issue of undue network power in program purchasing.

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[24] The "fact" of the networks' supposed 80 percent share of national advertising revenues does warrant some discussion, however, because it is wildly incorrect. To support its assertion that the three networks control the "vast majority of national advertising revenues (roughly 80 percent)," the majority cites the Department of Commerce's August 1, 1990 Reply Comments, implying the data used are official government statistics. In fact, the NTIA (for the Department of Commerce) Reply Comments attribute the statistic to the Media Access Project's June 14, 1990 Comments. The Media Access Project, in turn, derived the 80 percent either from a misunderstanding or miscalculation of data presented in a June 19, 1989 article in Broadcasting magazine that was an incomplete report of a study produced by Veronis, Suhler & Associates based upon 1988 data. A Veronis Suhler analysis, however, indicates that the three network share of national television advertising in 1988 was 50.5 percent, dropping to 48.5 percent in 1989 (Veronis, Suhler & Associates, Fourth Annual Communications Industry Forecast, July 1990). The Department of Commerce's official statistics for 1988 agree with Veronis Suhler, indicating that the three networks had only a 50.5 percent share of national television advertising in 1988 (U.S. Department of Commerce, Bureau of Census, Statistical Abstracts of the United States, 1990, at Table No. 934). The network share further fell to less than 47 percent in 1990 according to McCann-Erickson ("Inside Report", December 1990), which also is the source for the Census Bureau's data.

There is no mystery to correctly analyzing whether the networks possess undue power in buying prime time programming. A number of the commenters have done it and have come to the conclusion that the idea that the networks can exercise anything approaching undue market power is totally wrong. [25]

In determining whether a network possesses undue market power in purchasing programs, three conditions must be met. The first is that a network must be able to affect the market price of programming by altering the amount of programming it alone purchases. In other words, a network would have to be able to unilaterally reduce market demand for a program to such an extent that the market price would be reduced. Obviously, the smaller the share of total demand accounted for by one network, the less likely it is that the demand for, and price of, a given program would fall, because the smaller the network's share the more

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[25] This test of undue power in program purchasing, although not even referenced, much less discussed, in the majority's opinion, is commented on extensively in the record. See, e.g., Fox/NERA at 3-9; Summers, "Economic Consequences of the FISR Governing the Television Networks", at NBC, 7-11; United States Department of Justice Comments at 20-29; see also Further Comments of the United States Department of Justice at 3; Comment of the Staff of the Bureau of Economics of the Federal Trade Commission at 18; Further Comment of the Staff of the Bureau of Economics of the Federal Trade Commission at 2. Indeed, this same analysis was followed by both the Network Inquiry Special Staff in its 1980 Report, id. at Vol. II, p. 193, and the Commission in its 1983 Tentative Decision, 94 FCC 2d at 1063.

The majority apparently attempts to sidestep the need to refute this analysis by stating that it is "based primarily on antitrust principles and does not take into consideration the very real practical difficulties that a producer developing a program for one network faces when attempting to sell his program to another video distributor." Saying that the Department of Justice's analysis is based on antitrust principles hardly discredits it, as the majority seems to be suggesting. If the networks fail the test for monopsony power they cannot -- absent massive marketplace irrationality on the part of all the affected parties -- exercise the leverage in buying programs that these rules seek to limit. And if program producers are facing "very real practical difficulties" in selling a program to a different buyer than the one it was originally "pitched" to, the record evidence, discussed below, shows that even if this problem is "very real" it is hardly limiting the prices paid for programming talent or the migration of program purchasing away from the networks. See ABC Further Reply Comments at 7-8.

likely it becomes that other competitors will come forward to buy.

The second condition that must be met for the networks to exercise undue power in program purchasing is that it must cost more to produce each program as the number of programs produced increases. If, however, program supply can be expanded over a constant unit cost to cover all demand, purchase decisions will not affect the price, and if its purchase decisions do not affect price, a network cannot exercise undue power in buying programs.

Clearly related to the first condition, the third and final condition that must be satisfied is that a network would have to either foreclose, or be effectively insulated from, additional competition. If competitors can thwart a network's market power by increasing the demand for programming, the network cannot possibly exercise undue power in purchasing it.

All of these conditions must be met to show the existence of undue power in program purchasing. If even one is not, a network cannot exercise undue power in buying programming, and the majority's fears on that score evaporate.

Given the stringency of this test, it should come as no surprise that this degree of buying power exists only rarely in the real world, the classic examples being the turn-of-the-century "company town" and professional baseball prior to the striking down of the "reserve" clause. [26]

Do these conditions exist in the networks' purchase of television programming? The record in this proceeding shows beyond any reasonable doubt that they do not.

First of all, there is no conceivable way in today's television marketplace that one network acting alone could so affect the market demand for programming that the price paid would also be affected. The myriad of other potential program buyers constrains each network's buying power. The first source of constraints each network faces comes from the other networks. Although the majority tends to lump the three networks together into one monolithic entity, the record in this proceeding leaves no doubt that the networks compete furiously with one another for

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[26] CBS, Inc. Comments at 7-18.

audiences and advertising revenues, and that programming is the linchpin of that competition. [27]

Specific evidence of this competition among the networks for programming abounds in the record. For example, "The Cosby Show" was originally pitched to ABC, then sold to NBC; "Wiseguy" was developed at NBC, then sold to CBS; "The Bionic Woman" and "Taxi" both switched from ABC to NBC; and "The Hogan Family" switched from NBC to CBS. [28]

The ferocity of this inter-network competition for programming also shows in the many forms of specialized arrangements the networks enter into just to keep desired talent "on line." Increasingly it has become the practice to enter into license agreements even before a single script for a show is written. ABC reports that it acquired 30 to 40 percent of the pilots it considered in the spring of 1990 pursuant to the prescript licensing process, and of seven shows CBS ordered as mid-season replacements last year, four involved such an arrangement. In addition to these "prescript" license agreements, the networks have increasingly entered into "blind" series commitments, in which the network pays a penalty if it fails to order a set number of series from a program producer. This arrangement, like the "prescript" license deal, is made before any script, much less a pilot program, is seen by the network. Of fifteen new prime time series ordered by CBS from outside producers for the current program season, four were prescript license agreements, four were blind commitments, and two were developed by another network. In addition, some shows like "The Wonder Years" and "The Carol Burnett Show" are offered on a "free ball" basis, whereby a show is offered simultaneously to three different networks. [29]

The competition for programming is also evident at renewal time, and here again the record is full of examples. To renew "Murder She Wrote", CBS had to agree to fewer appearances by its star, Angela Lansbury, as well as to commitments to "blind" buy

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[27] The entrance by the networks into consent decrees with the Department of Justice does not mean the networks did not, and do not, compete vigorously with each other for programming and revenues, and the Department of Justice never contended that such collusion, express or tacit, ever existed. U.S v. CBS, Inc., 459 F. Supp. 832, 836 (C.D. Cal. 1978), cited in the record at, inter alia, NBC Supplemental Comments at 14.

[28] See ABC Reply Comments at 41; CBS Reply Comments at 15.

[29] CBS Reply Comments at 4-5, 14.

further projects produced by her company and by Universal Television. [30] The producers of "Cheers" recently demanded $120 million from NBC to renew the show to prevent it from being offered to other competitors. And even short of renewal, the copyright holder of "Murphy Brown" successfully renegotiated the program's license fee after only one year on the network as the price of retaining its producers. [31]

The competition for good programming is also evident in the prices commanded by program talent. The producer of "Family Ties," who stands to be paid between $70 and $100 million, observed of the amounts of money being paid to lure program talent that, "It's kind of shocking. It's a frightening thing." The producer of "Hill Street Blues" and "L.A. Law" has made a long-term commitment to ABC which will give him $50 million in cash up front - and if he produces a successful show, "hundreds of millions more." [32] With these dizzying amounts of money being bestowed on program production talent, Mel Blumenthal of MTM may perhaps be forgiven for indulging in the understatement of the century when he observed eight years ago that "There is tremendous and intense competition for our programming." [33]

Nor is it only the producers of hit series who benefit from this competition. The record shows that a producer whose only previous credits were two failed series recently announced the signing of a $12 million program development deal. The creator of the failed "Amazing Teddy Z" is being paid $1 million a year. Small wonder that Forbes magazine has observed that "The networks and studios...seem to have decided that the only way to develop the programs that will keep viewers from defecting to cable, home video, or...Fox...is to throw money at nearly every writer or producer with even the hint of a successful record." [34]

The existence of this competition is in no way undercut, as the majority alleges, by network "common practices" in negotiating program rights that "raise concerns about a producer's ability to find real alternatives to one network when

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[30] CBS Comments at 1,2.

[31] Jeffrey Sagansky, President, CBS Entertainment Division, 1990 En Banc hearing transcript, 125.

[32] CBS Comments at 21-22.

[33] Mel Blumenthal, 1983 En Banc hearing transcript, 125.

[34] Forbes magazine, November 12, 1990, cited in the record, NBC Further Comments at 12.

he is dissatisfied with that network's program licensing terms." First of all, even assuming it exists, mere parallelism, without additional evidence of collusion, tells nothing. In a perfectly-functioning market all prices are the same, and certainly no one would suggest that situation would bespeak collusion. Nor does the record in this case. To select one of the majority's examples by way of illustration, the one-year "freeze" on scripts developed by independent producers, such a freeze may well be a legitimate means of protecting one's investment in helping to develop a script, rather than the anticompetitive action the majority implies it could be. Indeed, the studios themselves apparently impose a two-and-a-half to four-year freeze on television development material prepared by independent producers. The "Basic Agreement" required by the Writers' Guild of America grants studios commissioning movie scripts the exclusive right to develop the script for up to five years.[35] Moreover, the record shows that, in any event, the networks do not "uniformly" freeze program materials acquired from outside sources. A script freeze is imposed in only one of the numerous deal-making procedures used by the networks to acquire programming. It is not used in the prescript, blind commitment, or "free ball" variations on the "typical" deal-making process, variations that are being used with increasing frequency.

Moreover, even when a script freeze clause is included in a program contract, the networks appear to enforce that clause in different ways. Thus, NBC states that not one of the more than one hundred scripts it commissioned in 1989 was frozen pursuant to a script freeze clause. [36] CBS states that, in recent years, it has released about one-third of commissioned scripts within three months of delivery and three-quarters of the scripts within six months. [37] ABC states generally that a freeze applies only to the handful of scripts which it decides to pay for and go forward with each season. [38] This evidence also shows that, in any event, scripts are rarely frozen for the full one-year period.

But the majority's feint at alleging network collusion need not be further refuted in the face of the sheer weight of record evidence that points the other way. And the intensity of this competition between the networks is not surprising given the

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35 NBC Reply Comments at 43; ABC Reply Comments at 40 n. 116.

36 NBC Reply Comments at 44.

37 CBS Reply Comments at 15.

38 ABC Reply Comments at 43-46.

importance of popular prime time programming to a network's bottom line. Over the course of a full season, a single prime time ratings point can be worth $100 million in advertising revenues. With the stakes that high, it is not surprising that the networks must have a ready supply of quality programming to insert into their schedules. Moreover, ratings are volatile, changing week to week and even day to day. The networks not only need new shows at the beginning of each season, but also backup shows to use as mid-season replacements. Against this competitive backdrop, one-third of a network's prime time programming may need to be replaced. [39]

In addition to competing among themselves, the networks compete against a large number of rivals in the market for video programming and their relative share of total demand has shrunk drastically. In 1970 the networks collectively accounted for 74 percent of all program purchases; by 1989 they accounted collectively for only 21 percent. [40]

Thus, the simple fact is that today the majority of video program purchases is accounted for by sources other than the networks, including syndicators, cable networks and the Fox Network. Cable television in particular, with its 90 national program services, continues to increase its expenditures on programming. This increase in available channels for programming has forever diluted whatever ability the networks may ever have had to leverage programming prices. [41]

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[39] Comments of CBS, Inc. at 7-18. The networks just concluded the closest ratings race in fifteen years, with four-tenth of a ratings point separating the first and last-place networks and only two-tenths of a ratings point separating the first and second-place winners. "NBC Wins by a Feather in Prime Time," Broadcasting, April 22, p. 39.

[40] Id. at 12; NBC Supplemental Comments at 13. At the same time Columbia, Time-Warner, Universal and Paramount account for almost 36 percent of all programming purchased, and first-run syndication alone accounts for 9 percent. CBS Comments at 12.

[41] The National Economic Research Associates estimates that, in a ten-station market, the networks broadcast an average of 298.5 hours per week out of a total 1400 broadcast hours a week and over 2100 cablecast hours a week. Fox/NERA at 8. NBC estimates that in 1989 the networks and their affiliates accounted for an average of only 36 percent of all TV viewing 6 A.M. - 1 A.M., and 29 percent of viewing over the entire day. NBC Supplemental Comments at 8. In light of this unmistakable ascendancy of competing outlets it is easy to appreciate the

The hallmarks of this dilution are plain to see. In May 1990 the networks' prime time audience share was 57 percent, compared to over 90 percent when the rules were adopted in 1970. And with its 57 share in May 1990, NBC was the highest - rated network, notwithstanding the fact that the May 1990 "sweeps" was its lowest May sweeps ever - even lower than when it was in last place ten years ago. Nor is it expected that this trend can, or will, be reversed. Cable executives quoted in the record predict that the networks' market share will sink below 50 percent in the next decade. [42]

So much for the proposition that a network could singlehandedly affect the price paid for programming through its purchasing decisions. Technically, it is not even necessary to discuss the remaining two tests for undue market power because all three tests must be satisfied to show it exists. However, the remaining two tests should be examined, if only to show how badly the networks fail them as well.

The second condition that must be satisfied to find that a network has undue market power in buying programs is that the cost of producing each program must increase as the number of programs produced increases. This situation patently does not exist in the program production industry. The Network Inquiry Staff Report showed definitively that the program supply industry is competitive and responsive to small changes in price. [43] The costs of program production only increase when the elements that go into producing a program are in short supply. None of the elements used in the production of video programming - actors, directors, writers, scripts, production equipment, etc. - are. [44] Because talent is equally usable for series, feature films, live performances, special programs, cable programs, first-run syndication, mini-series or made-for-TV movies, for a network to have undue power over the price of prime time series its purchases would have to represent a large

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enthusiasm of Gary Lieberthal, the Chairman of Columbia Pictures TV, in declaring that, "When I got into the business, there were five channels to watch. Now there are ninety. It's going to be software." LA Times, October 14, 1990, cited in NBC Further Comments at 11.

42 NBC Supplemental Comments at 10.

43 Network Inquiry Special Staff Report, Vol. II at 726.

44 Fox/NERA at 9.

share of the entire creative market. The statistics show that simply is not the case. [45]

Furthermore, the record is replete with evidence demonstrating that production talent is ready, willing and able to migrate away from the networks. As early as 1983, the cable networks began to bid, albeit unsuccessfully, against the networks for series like "Taxi" and "Hill Street Blues", and HBO and Showtime even then were purchasing series at per-episode prices comparable to the networks. [46] The migration of talent between broadcast network television and its non-broadcast competitors has accelerated markedly since then. Focusing on just one network, for example, in the last five years 46 percent of all the lead actors on CBS' 1989-1990 prime time series have crossed over to cable. The directors of CBS prime time entertainment series have demonstrated similar mobility: the director of "Designing Women" has worked on cable's "It's Gary Shandling's Show," the director of "Sydney" also worked as executive director for USA's "Sorry Wrong Number," and the director of CBS' "Snoops" is directing "Zorro" for The Family Channel. This underlines the credibility of the programming chief of cable's USA Network, who says, "I'm anxious that producers of note can come to us and realize that our level of funding is the same as the networks' and our dollars are spent the same way." Similarly, 70 percent of the actors and 45 percent of the producers and directors in CBS' 1989-90 prime time entertainment series have worked in the theatrical films within the last 5 years, and 40 percent have credits in first-run syndication. [47]

This point is an important one. Even if a network had undue power in buying programming, it could not compel a seller to offer a program below cost, because the seller would simply shop that program somewhere else, or not supply it at all. The most a network with undue power would be able to do is restrict the number or quality of programs purchased, thus driving down the price. If the price doesn't fall, however, when the number of programs purchased declines, this suggests that undue power was not exercised. [48]

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[45] NBC Supplemental Comments at 22.

[46] Fox/NERA at 10.

[47] CBS Comments at 11-12.

[48] Crandall, Robert W., "The Economic Case Against the FCC's TV Network Financial Interest and Syndication Rules", at 9.

Which leads to the question: are the prices the networks pay for programming declining? The record leaves no doubt whatsoever on this score. The acute competition for production talent has caused the price of programming to soar, not decline. Only a few of the numerous examples on the record will suffice to prove this point. Between 1984 and 1990, the fees for top executive producers have increased from $35 thousand to $75 thousand per 30-minute prime time episode. The three co-creators and executive producers of "Cheers" make $35 million apiece. The producer of "Family Ties" will make more than $70 million, perhaps as much as $100 million, and, as noted previously, the producer of "Hill Street Blues" and "LA Law" has made a long-term commitment with ABC which gave him $50 million in cash even without his having produced a single hit show. The creator of "Taxi" and "The Simpsons" is guaranteed $65 million for his next three series. The creator of "The Wonder Years" will get $15 million over a three year period. "Roseanne"'s principal writer gets $10 million over five years. The creators of "Married...with Children" have signed a three year, $32 million-dollar deal. CBS has an outstanding three-series commitment to producer Norman Lear, under which the network will pay a seven-figure penalty for any of the projects the network elects not to take. And on, and on, and on. [49]

Another indication of the lack of undue power is the networks' inability to control the difference between their programming costs and their advertising revenues so that the latter increase faster than the former. Since 1984 a steadily-widening gap has grown between non-sports entertainment programming costs, which have risen by 16 percent, and total revenues, which have fallen by 12 percent.

The last criterion for the existence of undue power is that there be barriers to entry for those wishing to compete with the networks. As recently as last July the majority recognized the relevance of this criterion to assessing market power when, in the Cable Report, it found that large, vertically-integrated MSO's lacked undue market power because they lacked "the unilateral ability to prevent the launch of new programming services." So do the networks. The emergence of the Fox Network as well as the plethora of cable networks has shown that such barriers to entry simply do not exist, and their competition for programming is sharp. The Fox Network's competition for the Lorimar-produced "Dallas," "Falcon Crest" and "Knots Landing" effectively forced CBS to renew all three shows as a package deal

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[49] Id. at 21; NBC Further Comments at 12; CBS Reply Comments at 4-5.

when it had hoped to renew only two. [50] And cable networks already outbid the networks for theatrical movies, buy more made-for-TV movies at higher prices than the networks, and are buying an increasing number of entertainment series. [51] Cable services televised more than 90 made-for-cable movies in 1990, nearly as many as the 104 original films that aired on the networks during the 1989-1990 season. Original movies on TNT are typically budgeted between $3 and $4 million, and HBO budgets between $5 and $8 million for an original movie. A recent HBO movie, "The Josephine Baker Story", broke the record budget for made-for-TV movies, costing $9 million. The networks only budget an average $2.5 million for a typical network made-for-television movie. [52] New cable services like In Court, American Trial Network, and The Cowboy Channel augur the continuation of this trend. Indeed, one independent producer recently enthused that

> Huge cable conglomerates, no longer satisfied with fifth-cycle movies and off-network fare, are already entering the television marketplace as important buyers of first-run product, including series...Whether we sell [our] services to a great number of companies, to a mix of conglomerate and independent companies, directly to cable or to first-run syndication, the demand for

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[50] Id. at 11.

[51] Contrary to the majority's observation that typical original cable-entertainment series are either topical or game shows, the record discloses that as of last June there were fifteen cable exclusive entertainment series and two more that are now in syndication to broadcast stations. These run the gamut from comedies like "It's Gary Shandling's Show" and "First and Ten" to "Vietnam War Story." Overall during the 1990-1991 television season about the same number of original entertainment series were telecast by non-network sources as by the networks, and this trend will continue. The Family Channel alone recently doubled its series budget to $100 million with seven new series. NBC Reply Comments at 9; Joint Network Comments, Vol. I at 81, 86. See also the statement of Gerry Hogan, President of TNT and TBS, in "Made-for-cable pic deals adapt to product glut," Variety, June 13, 1990: "We also steer clear of topical themes ... Instead, we're gravitating toward historical themes, biographical pictures, storylines with exotic settings."

[52] Electronic Media, November 12, 1990. Wall Street Journal, B1, December 17, 1990.

> product will exist and those of us with creative ability will supply it. [53]

The idea that there are technical barriers that prevent the expansion of video distribution capabilities is simply insupportable.

To repeat, not one of the three conditions necessary for the networks to exercise undue leverage in the purchase of network programming can be shown to exist on the basis of the record in this proceeding. Nevertheless, it would be unfair to leave this subject without some discussion of the specific points raised by the majority in support of their belief that such power does indeed exist by virtue of the networks' being supposedly "unique outlets of choice." With regard to the argument that undue power may be supposed from the fact that the networks reach 98 percent of all television households and retain a preponderance of the prime time viewing audience, the above analysis makes clear that audience delivery power and nationwide coverage are not, and cannot be, the critical measures of program purchasing power. Cable television services bid for talent on the basis of subscriber revenues as well as advertising revenue. [54] As noted previously, cable revenues from subscribers and advertising amounted to $18.7 billion dollars in 1989, and are expected to grow rapidly. [55] Contrast this with the networks' situation. Not only has their collective audience share declined to below 60

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[53] Alan Horn, The Caucus Quarterly, April 1990, at 9-10, cited in the record in NBC Supplemental Comments, 16. This echoes the view of Nick Nicholas, Chairman and CEO of Time-Warner, who recently stated that "The largest potential growth, if you're a television producer, is in cable. Warner Bros. and Lorimar will be producing more and more for cable." Electronic Media, June 4, 1990, cited in the record by NBC, Further Comments at 11.

[54] See, e.g., ABC Further Comments at 5, n.9.

[55] It is, moreover, inapposite to conclude that the small audience shares attained by cable programming restrain cable's program purchasing abilities, because cable programming is designed for multiple repeat showings and it is this cumulative audience that is sold to advertisers. Thus, for example, cable networks may schedule as many as 18 repeat showings of a single program. Even with these repeat showings cable network audiences have risen dramatically over the last decade, from 5.3 percent in 1980 to 26.6 percent in 1989.

percent, their dominance of the advertising market has also declined sharply. In 1970 the networks received 48 percent of all television advertising dollars; today they receive about 35 percent. In 1989 alone, the networks' share of advertising revenues, adjusted for inflation, declined over 5 percent. [56] Moreover, because the networks' competitors - basic cable, pay cable, pay-per-view, and videocassettes - are able to obtain greater revenue per viewer than the networks, the networks have lost, and will continue to lose, an even greater share of the total revenue potential from the video marketplace. [57] Thus, in comparing the networks to cable in terms of audience reach, audience share and advertising revenues, the Commission sets up a classic "apples to oranges" comparison readily evident on reading the record.

Nor is it pertinent that the entertainment program expenditures of each network exceeds those of all cable networks or all first-run syndicators. This could only be a badge of undue power if program producers had nowhere else to go to sell their product. But they do - in fact, they have so many options that, as noted previously, in 1989 the networks accounted for only about 21 percent of all the expenditures on entertainment programs.

Finally, if neither sound economic analysis nor the facts appearing on the record will support the majority's theories on network dominance, neither will the law. The three networks have a collective audience share of approximately 60 percent, which means that the share of each network hovers around 20 percent. The courts have clearly held that an entity's holding of even one third of the relevant market is, as a matter of law, insufficient to support a claim of monopolization of the market. [58] Nor can the market shares of the individual networks be aggregated for the purposes of determining market power absent evidence of collusion. [59] There is no evidence whatsoever of collusion on this record - indeed, the evidence of record points clearly and unmistakably in precisely the opposite direction. Thus, even if

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[56] NBC Supplemental Comments at 10-12.

[57] Crandall, "The Economic Case Against the FCC's TV Financial Interest and Syndication Rules," at 24.

[58] Levitch v. Columbia Broadcasting System, 495 F. Supp. 649, 665, 668 (S.D.N.Y. 1989) aff'd 697 F.2d 495 (2d Cir. 1983), cited in the record, NBC Supplemental Comments at 25-6.

[59] H.L. Hayden Co. v. Siemens Medical Systems, Inc., 879 F.2d 1005, 1018 (2d Cir. 1989), cited in the record, id. at 27.

audience share were somehow an appropriate measure of undue power in the program buying market - which it is not - the networks' audience shares demonstrably negate the existence of such power.

So in sum, the majority is right about its facts; it is simply wrong about their relevance to the issue of network dominance in the program buying process. Unique as the networks may be in some ways, this uniqueness is not synonymous with dominance in the purchase of television programming.

Diversity Through Regulation

The majority premises its adoption of these new rules on the proposition that they will bring about diversity. Unfortunately, however, the record shows that the rules' restriction on the networks' ability to finance program production has had the effect of reducing, and not promoting, diversity in a wide range of voices. To sample a few of these statistics: in 1970, eight firms, primarily the major Hollywood studios, accounted for less than 50 percent of prime time entertainment series offerings; by the 1990 program season, they accounted for over 70 percent. [60] The number of prime time program suppliers has decreased substantially from 55 in the 1969-70 season to 33 in the 1988-89 season. Four firms, primarily the major studios, accounted for 46 percent of the prime time entertainment series in 1988-89, up from 35 percent in 1969-70. Eight firms, primarily major studios, accounted for 65 percent of the prime time entertainment series in 1988-1989, compared to 49 percent in 1969-1970. [61]

Nor have the rules achieved the intended effect of swelling the ranks of the independent producers. In 1970, 22 of the 25 suppliers of non-in-house produced programming to CBS were independent. Of this total, six have merged with major studios or syndicators and fourteen are inactive; only two remain both independent and active. I would presume that this is the very

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60 Joint Network Comments, Appendix E; NBC Supplemental Comments, at 16.

61 Joint Network Comments, id. NBC submits that it received prime time programming from three independent producers in 1990, down from 9 in 1979; CBS states that it purchased programming from only 9 independent producers in 1981-82, down from 22 independent producers in 1970. According to CBS, MPAA members supplied 20 percent of CBS' prime entertainment programming in 1969-70, but supplied 58 percent of CBS's programming in 1988-89. See also Fox/NERA at 9.

sort of assimilation the majority seeks to prevent the networks from perpetrating by imposing limits on in-house production. Why does the majority not pause for thought when the major Hollywood studios are the ones doing the assimilating? [62]

The reason for this reduction in the ranks of the independent producers is not hard to see. In the face of deficit financing and with the networks barred as a funding source, independent producers have had only one realistic industry alternative to turn to for financing - the major Hollywood studios. Moreover, this phenomenon has had a multiplier effect - as the major studios have gained market share they have also inexorably bid up the price of creative talent to the point that the ability of the remaining independent producers to compete for it has correspondingly shrunken. As NBC programming executive John Agoglia observed, "As stars get more expensive and directors get more expensive and as producers get more expensive, you have to be able to pay the up-front costs of bringing those kinds of individuals into your production entity. And that becomes very difficult for an independent producer. That is what makes it increasingly necessary for an independent producer to have some kind of financial backing...[T]he price of the studio financial backing [] is to come into the studio system." [63]

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[62] The program producers attempted to show on the record that the number of prime time program suppliers has actually increased since 1970. The disparity between their statistics and the networks' appears to be due to different methods for counting independent producers. The Joint Networks counted as the producer of an outside project only the leading producer that was their primary contact regarding the project. The Coalition, on the other hand, appears to have counted any independent producer that may have participated in a project, even if the independent played a subsidiary role to a major studio that controlled financing of the production. Independent producers supervised by major studios that hold financial control over the project can hardly be deemed to be "independent." In fact, the majority would seem to recognize this in setting out as an essential element of a network "in-house" production that the network retain total control of financing. The same logic must surely render projects totally financed by the Hollywood studios "in-house" Hollywood studio productions.

[63] Letter from John J. Agoglia to Paul Junger-Witt and Tony Thomas, January 11, 1991, copies of which were sent to each Commissioner. It should also be noted that the mere fact that network television programming is produced at a deficit is not an indication of undue network power in buying it. Production deficits are common in the supply of programs to cable networks,

In surveying the effect of the rules in 1983, the Commission stated that, "to the extent the rules, by excluding efficient sources of financing from the market, create barriers to market entry or create pressures for smaller producers to join with larger firms, the rules are operating in a manner contrary to their stated purpose and serve no valid public purpose." [64] That is precisely what the record shows them to be doing, yet the majority fails to draw the unavoidable conclusion.

Active Syndication

Although liberalizing the rules in some limited respects, the majority continues to bar the networks from engaging in the syndication of prime time network shows not produced in-house, and first-run syndicated programming. [65]

The majority believes these restrictions are necessary because program suppliers and distributors require structural protection to help insure a diverse and competitive supply of programming to local television stations. In this regard, the majority states that the current prohibition on domestic syndication has contributed substantially to the growth and success of independent television and first-run syndication, as well as a competitive syndication market. Thus, allowing a

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movies, distributors, series to networks, and also in other businesses involving creative work that has potential value in multiple uses. ABC Further Comments at 8.

[64] 1983 Tentative Decision at 1094.

[65] One area of apparent liberalization comes in foreign syndication. Under the new rules the networks will be allowed to actively syndicate in foreign markets not only in-house productions but also outside productions for which they can acquire such rights in the course of the new, Commission - mandated negotiation process. The rationale for this more liberal approach to foreign syndication rests in substantial part on factors like the proliferation of competitive production resources and the benefit American viewers could gain from the networks' investment of the revenues from this syndication activity into creative programming. Even if one overlooks the facts that the same benefits would accrue from network participation in same domestic syndication activities - which the new rules restrict more severely than foreign syndication - the two-step negotiation process under which foreign syndication rights must be gotten will effectively preclude the networks from getting them. See discussion infra.

substantial degree of network involvement in the off-network and first-run syndication markets could result in a less diverse, more concentrated syndicated market.

By the Commission's own admission when it adopted the rules in 1970, the preclusion of network participation in syndication was a solution in search of a problem. The Commission admitted that its restrictions were entirely prophylactic. [66] Indeed, available statistics indicate that the networks took domestic and foreign syndication rights in only about 28 percent of the prime time entertainment series programming between 1958 and 1968, and accounted for less than one quarter of all syndication sales. [67] From this perspective it is difficult to understand why structural safeguards are necessary to protect anyone, given the changes in the video programming market that have since occurred.

If the majority believes they are warranted because it believes the current rules have helped to bring about the growth in independent television stations, first-run syndication and a competitive syndication market, it stands virtually alone in that belief. As the record points out, marked expansion in the number of independent television stations did not really begin until 1979, nine years after the rules' adoption, and closely tracked the penetration of cable service. It is thus much more likely that the expansion of cable television service, which eliminated the UHF/VHF station disparity, was responsible for the growth of independent stations, not the fin/syn rules. And it was the growth in the number of independent stations that in turn helped spur the growth in first-run syndicated programming. In other words, whatever other kind of medicine may have contributed to curing the previously - ailing UHF independent television sector, the rules can most charitably be described as having, at most, an unusually - delayed time-release action. [68]

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[66] The Commission acknowledged that there was "no evidence" that the networks had been "taking advantage in syndication distribution of their existing relationship with their affiliates," saying that the rules were intended instead to "eliminate the potential for competitive restraint." Memorandum Opinion and Order in Docket No. 12782, 25 FCC 2d 318 (1970).

[67] Crandall, "The Economic Effect of Television - Network Program 'Ownership'," supra at 398-99.

[68] The Commission itself has previously recognized that cable has helped UHF stations. Report and Order in Docket 20988, 79 FCC 2d 663 (1980). And see Joint Network Comments at 88-91; Crandall, "The Economic Case Against the FCC's Financial Interest and Syndication Rules" at 20; 1990 INTV Census; National Cable

As to the rules' having brought about the development of a competitive syndication market, they appear to be having precisely the opposite effect. And, not surprisingly, the major Hollywood studios have emerged as the big winners. While the tremendous growth in first-run syndicated product might have been expected to produce less concentration in the syndication industry, concentration in that industry has remained constant, while the major Hollywood studios' market shares have doubled. Last year the eight largest studios controlled 63 percent of the $3.4 billion syndication market, and last year the largest syndicators accounted for 77 percent of domestic syndication revenues, up from 64 percent the previous year. [69] To the casual observer, this looks awfully like a market that could benefit from some added competition.

If the majority now holds that the rules have in fact contributed to diversity, it parts company with the findings of the Network Inquiry Special Staff as well as the conclusions of the Commission in 1983. After its extensive study and analysis of the relationship between the networks and program suppliers, the Special Staff stated flatly that, "The financial interest and syndication rules can only be characterized as misguided at best.... Competition in the syndication market has not been fostered by the rules, for that market was competitively structured prior to their imposition." [70] After analyzing the results of extensive public comment on the Staff Report, the Commission in 1983 adopted its finding, declaring that, "... we have found no credible evidence that the rules have fostered the development of first-run syndicated programming or have increased the diversity or competitiveness of the program supply market." [71]

Against these findings that the rules have not increased either diversity or competition in the syndication market, the majority must offer more than a simple declaration to the contrary. It must proffer a sound and reasoned basis for its diametrically-opposite conclusion. Against the voluminous pages and years of study of the program supply market that led to the

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Television Association, "Cable Television Developments," May 1990.

[69] Joint Network Comments at 92-94.

[70] Network Inquiry Staff Report, Volume I, 51, Volume II, 732-736.

[71] 1983 Tentative Decision at 1094.

Commission's prior conclusion, it will not suffice for these purposes to simply conclude that the rules spurred the growth in the number of independent stations and first-run syndicated product just because the latter occurred while the rules were in effect. Under this theory, the rules could equally well be given credit for Secretariat's breaking the track record at the Belmont because that also occurred while the rules were in effect. And under this theory, perhaps the best argument in favor of perpetuating these restrictions is that one day they may cure the common cold.

It is mighty difficult to argue that injecting three more competitors into a market that is becoming increasingly concentrated will somehow reduce competition. But the Commission recognized in 1983 that two possible types of network behavior -- warehousing and affiliate favoritism -- could have adverse effects on both independent stations and network affiliates. The majority today finds the prospect of such behavior daunting enough to keep the networks largely out of the syndication business. Here again, however, the majority's decision fails to square up with the facts on the record and the majority has offered no reasoned analysis for its divergence therefrom.

The gist of the warehousing argument is that the networks could restrain competition in the market for network reruns by collectively acquiring syndication rights in programs in order to withhold some less popular programming from syndication. According to this theory, the networks' efforts to withhold programming would be profitable because, by restricting the quantity of available programming, they would drive up the price of the more popular programming they chose to sell.

This warehousing scenario is implausible for a number of reasons. First of all, the theory falls to pieces if off-network reruns are not a product distinguishable from first-run syndicated programming. The facts on the record belie the argument that they are. Today the national audience for first-run syndicated shows has grown to represent 70 percent of the total audience for syndicated product. In a typical recent week, 14 of the 15 highest-rated syndicated shows were first-run and these reached more than 96 percent of the nation's television households. [72] Not surprisingly given these statistics, by 1989 independent stations in the top 50 markets relied on programming

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[72] Reply Comments of NBC at 6-7; Crandall, "The Economic Case Against the FCC's TV Network Financial Interest and Syndication Rules," at 17; Summers, "The Economic Consequences of the Financial Interest and Syndication Rules Governing the Television Networks," at 14.

other than off-network reruns over half the time during their early fringe and prime time access period dayparts. [73] Even during the early fringe daypart when off-network reruns still comprise the majority of independent stations' schedules, the ratings garnered by reruns and syndicated programming are virtually identical. During February 1990, all off-network reruns on independent stations in the top 50 markets averaged a 4.4 rating, while first-run syndicated and other shows each averaged 4.2 ratings. And, focusing just on the off-network reruns, while the handful of "hits" averaged a 6.3 rating the bulk of more typically off-network reruns came in with an average 4.1 rating. [74] Among shows broadcast by independent stations averaging a 3 or better rating in 1990, 39 were first-run and only 6 were off-network reruns. Of all the shows garnering a 2 or better rating, 68 were first-run and 55 were off-network reruns. Indeed, in its own comments the Association of Independent Stations says that independent stations are "using more first-run product and becoming increasingly selective about [off-network reruns]." [75]

With regard to the viewing patterns of off-network reruns and first-run syndicated product on network affiliates, a 1983 Commission analysis of programming shown on all stations, independents as well as affiliates, showed that in February 1982 the 102 most popular syndicated programs shown, regardless of time period, included 45 off-network shows and 57 others. Of the 16 of these that got a 5 or higher rating, only four were off-network reruns. [76]

Proponents of the warehousing scenario generally do not allege that the handful of hits would be withheld from the market. They assert that marginal off-network programs would be withheld in order to drive up the price they receive from the hits. This would clearly be a futile endeavor because, as the

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[73] CBS Reply Comments at 39-40.

[74] Further Comments of INTV, Vol. II, Exhibit 2, at 6.

[75] Association of Independent Television Station Comments at 19. Paul Kagan and Associates, in the Television Program Investor of March 31, 1990, stated that, "[Independent stations] are looking to procure more first-run product, in order to differentiate themselves from other program sources. They are content to pick the best off-network programs and let the rest go to cable." Id. at p. 3, cited in the record in CBS Reply Comments, at 39.

[76] 1983 Tentative Decision at 56, n. 65.

foregoing facts indicate, first-run syndicated programming is clearly comparable in ratings to the bulk of off-network programming.

Thus, the record points unmistakably toward off-network reruns and first-run syndicated programming not being distinct products, in which case warehousing concerns disappear. But even if this were not the case, the strategic behavior in which the networks would have to engage to make warehousing work would be impossible for even the most enthusiastic gamers of the market.

The Department of Justice, which the majority would hopefully concede has preeminent expertise in these antitrust-related issues, states flatly that the likelihood of warehousing is remote given the number of variables the networks would have to control to make the strategy work.

First of all, the networks would start off in this exercise owning no syndication rights whatsoever, since they have been kept out of syndication since 1970. This being the case they would have to build or acquire syndication arms and begin to acquire syndication rights. Since it takes four or more years of episodes to make a program syndicable, they would not be able to even enter the market for several years at best. Next -- and this is the real trick -- they will have to acquire the rights to syndicate all the shows that they develop. But it would be prohibitively expensive for them to do that, and impossible to decide in advance which would be the programs needed to make the warehousing strategy a success and instead buy only those. For example, the amount of programming required to be warehoused to achieve profit-maximization would differ from market to market: broadcast markets with many independent stations will demand more programs than will those with few stations, and thus fewer programs would be warehoused in the larger markets than in the smaller ones. Also, viewer preferences vary from market to market, thus requiring that the set of programs warehoused would have to vary from market to market. On top of this comes the complication of having to make side-payments to the network with the fewest hits. The network with the fewest hits will make the least from warehousing its marginal programming. Therefore, to keep this network a happy member of the cartel, the other two networks would have to make it "whole" by side-payments, leading the Department of Justice to observe that "the coordination required to organize and sustain a collusive agreement among the networks would appear to be quite difficult -- not to mention illegal under the antitrust laws." [77]

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[77] Department of Justice Reply Comments at 21.

Moreover, in the final analysis it seems counterintuitive to suppose that network affiliates would be willing accomplices in this supposed network strategy. Why would an affiliate outbid an independent station only to warehouse the program? Affiliates' available time for programming is more limited because of the time they devote to the broadcast of network programming and because of the prime time access rule. For them to buy programming and then not broadcast it, particularly under these circumstances, would be both irrational and highly visible. For all these reasons, the Department of Justice concludes that it would be difficult for the networks to warehouse programming successfully and keep it secret. In a more emphatic vein, Action for Childrens' Television et al. state flatly that any such attempt would "shine like a mackerel in the moonlight." [78]

Thus, the prospect of warehousing, judging by the record, it so remote that keeping the networks out of the syndication business on this score is completely arbitrary. Nor will the specter of affiliate favoritism supply the missing rationale. Quite telling in this regard is the record evidence showing that the networks did not favor their affiliates when they did syndicate their own reruns. Prior to the rule, by dollar volume only 11 percent of all of CBS' domestic syndication sales were to CBS affiliates, and only 22 percent of its program contracts were written with CBS affiliates. Similarly, NBC affiliates constituted under 20 percent of all purchasers of syndicated product from NBC. [79]

Moreover, in theory any entity that syndicates programming, and which also has contractual relationships with particular stations, would have the same incentive to favor its stations in the sale of syndicated programing at the expense of other competitors in the market. The fact that there is virtually no record evidence to suggest that syndicators with these types of relationships in fact abuse the arrangements through

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[78] Department of Justice Comments at 32-33; and Action for Childrens' Television et al., Comments at 14.

[79] ABC Further Comments at 39. Between 1967 and 1970, 66 percent of all CBS' sales, in dollar volume, went to independent stations, and data available for the sale of ABC's and NBC's most popular shows in 1970 shows that their respective affiliates accounted for only 11 and 13 percent of the sales of these programs, respectively. Independent stations accounted for 67 and 80 percent. Letter from Martin D. Frank, Vice President, CBS to Honorable James H. Quello, March 6, 1991.

anticompetitive favoritism suggests that its perpetration makes no economic sense in today's marketplace. It is not difficult to reason why this would be so. The direct benefits a network would realize from obtaining the highest price in any given market for a syndicated program would far outweigh any derivative benefit the network might receive by bolstering any affiliate's competitive position in the market by selling a popular program to it at a lower price. And how would the affiliate compensate the network for the benefits of its favoritism?

Finally, the syndication restrictions effectively allow foreign-owned conglomerates to participate in the profits generated by American network programming but restrict the ability of U.S. companies to do the same. I simply cannot support regulations that divert profits from our domestic television industry off-shore while disadvantaging American companies.

Other than the fact that no one would be hurt, and competition would be advanced, are there other public policy reasons for allowing the networks to participate in syndication? As the Department of Justice notes, syndication rights prior to broadcast of a program are speculative; in many if not most cases the syndication rights turn out to be worth little or nothing. Indeed, to the extent they do have value, the highest value for syndication rights may be to a television network, because the network-affiliate system gives the networks not only the incentive, but also the best ability, to promote programs in a way that maximizes their syndication value as well as their broadcast value. Restricting the networks from actively syndicating product may lead them to make insufficient investments in program promotion, which could lower a program's value in syndication. [80] As the Commission noted in 1983, if "less investment in programming occurs as a result of the networks' exclusion from the syndication market, or if networks choose less risky programming than they would if they could obtain syndication rights, then the quality and diversity of network programming and the networks' competitive position relative to the other media will be harmed." [81] That result is squarely at odds with the Commission's intent to advance

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[80] Department of Justice at 14, 16-17. See also Letter of Jeffrey Sagansky, to Honorable Ervin S. Duggan, at 5.

[81] 1983 Tentative Decision at 1089.

diversity and preserve the structure of over-the-air broadcasting of which the networks are the foundation. [82]

The In-House Production Limits

The majority rests its adoption of a limit on in-house production to 40 percent of the network prime time schedule on the need to promote a diverse supply of network programming and to limit the amount of initial network involvement in the domestic syndication market. As the preceding discussions demonstrate, no competition or diversity concerns warrant restricting the networks' participation in domestic program syndication. Beyond this, the record is totally lacking in any empirical evidence whatsoever suggesting that there is any practice by the networks so harmful to either diversity or competition that it requires redress by the severe measure of limiting the networks' ability to produce their own programming. As the Department of Justice notes, the in-house production limits contained in the Department's consent decrees with the networks were intended to be temporary limitations on the networks' activities, and there has been no showing on the record that these limitations should be extended by Commission regulation.

Regulations imposing limitations on how much any firm can produce internally are one of the most extreme forms of Governmental intervention in private enterprise. Unless they are fully justified by the most extraordinarily compelling competitive considerations, they are by their very nature anticompetitive. Thus, in the Department of Justice's view, such restrictions should not be imposed without "strong theoretical

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82 These perverse results of keeping the networks from freely competing in the syndication business illustrate well the truth of the Network Inquiry Special Staff's observation that networks, affiliates and program suppliers are co-venturers, none of which can succeed without the other and each of which has a stake in maximizing the profits that can be realized by the network system. Thus, "when the Commission responds to assertions of network abuse by framing the issue as how best to rectify damage inflicted by networks on affiliates or program suppliers, it will usually be responding only to controversy over the distribution of profits, the point at which the interests of those groups diverge. The public interest -- the interest of viewers in competition among television firms, diversity in program choice and local, individual control over broadcast services -- may be completely unaffected by the manner in which these disputes are resolved." Network Inquiry Staff Report, Vol. I, at 21.

and evidentiary support for the conclusion that anticompetitive effects are quite likely in their absence." [83]

Both theoretical and evidentiary support for restricting the networks' in-house production are completely lacking in the record of this proceeding. In analyzing the theoretical premises for such limitations, the Network Inquiry Special Staff concluded that, since a network would not engage in-house production unless it were the most efficient way of doing business, there is no reason to suppose that a network would select an in-house program over a program produced by an independent supplier unless it appeared that the network could produce a program it valued equally at a lower cost, or a program of higher value at an equal cost. And after examining all the possible diversity and competition-based reasons for adopting in-house limits the Report categorically rejected them all, stating that such limitations "would restrain competition in the program supply business by eliminating potential suppliers, cause the production of the same programs at higher cost or forestall their development entirely... all without any obvious benefit to viewers." [84] Evidence from existing network production activities does not suggest that there are significant quality or cost advantages to networks accruing from internal production activities. [85] Furthermore, the networks are currently under no restrictions on in-house productions and, if they have any anticompetitive incentive to foreclose independent program suppliers, one would expect that incentive to have manifest itself before now. In point of fact, however, all the evidence on the record of this proceeding points to the fact that the networks will continue to acquire the vast majority of network entertainment programming from outside suppliers. [86]

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[83] Department of Justice Comments at 12.

[84] Network Inquiry Special Staff Study Report, Vol. 1 at 391, Vol. II at 768-773, cited at Joint Network Comments at 46.

[85] In fact, the appeal of independent talent is shown by the fact that, over the last six seasons, ABC in-house productions have enjoyed less success in terms of scripts, pilots, and series ordered than independent productions. ABC Further Comments at 19; CBS Further Comments at 8.

[86] Id. See also Department of Justice Further Comments at 25-26.

Nor will the lack of limits on in-house production give the networks power to drive the price of programming below cost. Because the networks fail the three-part test for undue power to affect the price or supply of programs, if they tried to affect the price or supply of programs by increasing in-house production, the only reward they would reap is higher costs. And in practical effect, the operation of this rule could force a network at or near the cap to remove a popular in-house program merely because it wants to put on a promising new in-house show. I am at a loss to explain how the public interest would be benefitted by forcing networks to make this kind of Hobsons' choice. Moreover, by placing an incentive on the networks to bring independent producers in-house so as to gain the ability to domestically syndicate the in-house shows, the in-house provision could prevent those producers from providing shows to other entities, particularly new networks, thus producing a result at odds with the majority's intent to further diversity and competition.

Finally, there is the unavoidable fact that limits on in-house production restrict the networks' ability to use their facilities to speak. Even if the limits are regarded as "incidental," that is, unrelated to the protection or suppression of a particular set of ideas, the majority would have to demonstrate that they are narrowly tailored to serve an important governmental interest in the least restrictive manner possible. [87] The preceding analysis makes plain that they do not, and therefore they do not pass this constitutional test. In sum, the majority's in-house production limit is an extreme form on governmental intrusion into business that is not justified on analytical, evidentiary, or constitutional grounds.

The Two-Step Negotiation Process

Another example of gross governmental intrusion into the workings of business is the new rule the majority adopts that dictates the procedures whereby networks and program producers may negotiate for financial interests. This rule mandates a 30 day waiting period between the time the parties enter into agreement on a program's license fee and, where applicable, pilot production, and the time they may begin to negotiate over network acquisition of financial interests in the program.

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[87] US v. O'Brien, 391 US 367, 377 (1968). However, where, as here, the restriction is intended to curtail expression either directly or indirectly by favoring certain classes of speakers over others, the burden of proving the necessity for the regulation is significantly heavier. See Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1451 (1985).

On its face, this rule constitutes the type of regulatory micromanagement this Commission has been at pains to avoid over the last two decades. Nor can justification for this sudden burst of federal intermeddling be found in the record. If the record is clear on any point, it is clear on this one: that this "two-step" negotiation process makes no sense in theory and, contrary to the majority's statement, in practice cannot achieve the goal of enabling the networks to become profit participants in the back-end rights of non-in-house produced programming.

The premise of this two-step negotiating process is the majority's concern over "extraction." Of all the windmills subject to the majority's collective lance, none is charged more furiously than extraction. So potent is this term that, although they find it necessary to erect a regulatory superstructure to guard against it, the majority finds it unnecessary to define it. They know it when they see it, and it is bad. Used by the majority to describe network acquisition of ownership rights in the off-network distribution of programming "from unwilling producers," or "for less than fair market value," these alarming elaborations collapse upon examination.

The sale of program exhibition rights is a voluntary transaction, undertaken in the expectation of making a profit. While program producers (and all sorts of other business people) sometimes guess wrong, none of them agrees to create a series unless the expected revenues from the sale of various rights are enough to cover their full costs of production. So much for unwilling producers.

Fair market value sounds like just what every seller ought to receive, but in the case of differentiated services like television programs, with uncertain future revenue streams, how is it to be determined? Because each television series is different, the interaction between network and program supplier is more akin to bilateral monopoly than to monopsony: in plain terms, both sides have a certain degree of bargaining power. In this context, the "market price" is indeterminate even theoretically. At best, one can set upper and lower bounds. The lower bound is simply the minimum that the producer is "willing" to accept; i.e., enough to cover all relevant expected costs of production. The upper bound is related to the additional revenue that the network would earn from exhibiting the program. Where the price falls within this range depends on the bargaining power of the negotiators. The networks' bargaining power stems from their ability to provide national exposure to the program. The producers' bargaining power stems from the creativity of their ideas, their ability to pit three or four networks against each other in a bidding war, and even from their option to put

projects that do not receive sufficiently high bids on the shelf and turn their talents to other projects for other outlets--cable, theatrical, etc.

Notwithstanding the fallacy of the majority's fixation on extraction, the 1980 Special Staff Report, the 1983 Tentative Decision, and the Department of Justice, among others, point to the conceptual reason why, even if extraction could occur, an approach like this would be completely ineffective in preventing it. Simply put, whether or not the networks really do have market power in buying programming, if they cannot negotiate for financial interests when they negotiate the license fee for a prime time show, they will merely lower the license fee. In the face of real market power, this would present a program producer with an unsolvable take-it-or-leave-it problem, because there would be nowhere else to go to sell the program. As discussed previously, the facts completely discredit the notion that the networks have this kind of market power given the cornucopia of outlets for programming that exists today. But the point is, even if they did, no waiting period, be it 30 days or 30 years, would cure it. Or, as the Network Special Staff put it, "Because regulation of one or a few contract terms does not alter the number or identity of network firms, or the structure of the market within which they operate, such regulation leaves unaffected the very bargaining power that initially gave rise to the concern. That bargaining power, in turn, will usually enable the target firms to frustrate the regulation's compensatory purpose by altering other terms of the agreement to regain their advantage." [88]

Even if this fundamental problem did not exist, the two-step process is completely incapable of achieving the majority's stated aims of giving the networks the chance to share in the syndication profits from prime time reruns and increasing the networks' incentive to invest in risky programming.

The three networks, the Department of Justice, and Action for Childrens' Television et al. are of one voice in showing that the two-step process represents a total misunderstanding of the way the program purchasing business is conducted. The variety of approaches used in the real world by the networks and producers to structure program deals has been discussed previously. Networks buy series "blind" without a particular program in mind, but rather trying to find a way to use particular talents. In such transactions, every element of the deal is in play, and all

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[88] Network Inquiry Staff Report, Vol. I at 23, and see 1983 Tentative Decision at; Department of Justice Comments at 26-27; Action for Children's Television, Further Comments at 2.

facets of the deal are interdependent. It is simply not possible, in such circumstances, to reach agreement on any one facet of the deal without knowing how the financing will be covered. In such deals financing discussions must take place when the license fee is being negotiated, or this type of deal becomes impossible. [89] The separate negotiation process will also not work on coproductions or multi-project deals. This is particularly unfortunate given the ascendancy of such forms of deal making and, in particular, their popularity with the production community itself. [90]

Perhaps most significantly, the two-step process will not give the networks any increased ability to obtain financial interests because most of the prime time series in the networks' schedules are now financed by studio "umbrella," or similar deals. Under these umbrella deals the studios provide financing and production facilities to the program's creative team in return for sale of their ownership and distribution rights to the program product, not only to the first program produced with the financing studio's facilities, but also to upcoming projects for a set period of time. Thus, in the real world the producers of many network series most often sell their ownership and distribution rights to the major studios long before they ever sit down with a network to talk about a license fee. [91]

Even where "umbrella" arrangements do not exist, a producer typically "resells" its syndication rights considerably before any order is placed for the series. Therefore, financing is almost always arranged by the time the network orders the pilot and commits to license fees. Where there is no pilot, financing is arranged before the series license fee is set. A network will not order a series pilot without an assurance that funding is for both the pilot and the series is in place. The record is completely unambiguous on the point. [92]

Moreover, given this compelling need for earlier financing there is absolutely no reason to assume that these economic realities will somehow magically change to fit the majority's

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89 NBC Further Comments, at 26-27.

90 Id. at 23.

91 ABC Further Comments at 11-17; CBS Further Comments at 14-15.

92 ABC Further Comments, id.; CBS Further Comments at 17; NBC Further Comments, Affidavit of John Agoglia, President, NBC Enterprises, at 4-7.

two-step scheme. The present system has evolved precisely because of the need to accommodate the current rules, which preclude the networks from providing up-front financing for independently-produced programs. This in turn has driven independent producers into the arms of other entities not similarly limited -- the major Hollywood studios. By delaying the networks' ability to negotiate for financial interests until long after the point where the necessary arrangements will already have been made, the separate negotiation process will accomplish nothing. Based on this fact, one can assume the market will adapt quite effortlessly to the new regime, because absolutely nothing will change. Despite the majority's claims that it will enable the networks to acquire financial interests in non-in-house produced programs, this two-step negotiation is the functional equivalent of giving a motorist with a flat tire a dead battery.

Yet another fundamental flaw in this new negotiation scheme is that it will "protect" the large multinational Hollywood studio corporations in exactly the same way as first-time program producers. In mandating this result, the Commission either must seriously believe that the networks can "extract" concessions unwillingly from these Hollywood megacorporations, or else it must believe that most programming still comes to the networks directly from independent producers, who hold the entire bundle of rights to it.

Even if I believed, which I do not, that the interests of diversity must be satisfied by diverse sources of sitcoms; even if I believe, which I do not, that the competition each network confronts from the other broadcast networks and non-broadcast buyers of programming is insufficient to assure that they cannot deal abusively with program producers; and even if I believe, which I do not, that the two-step negotiating practice will deter that abuse, why would I believe that the same extraction concerns would attach to MGM or Universal as to a new, truly independent producer? I will admit to worrying about many things as a public policy maker, but in all candor worrying about whether CBS is extracting rights from Sony or whether Time-Warner is being mugged by ABC is not something that keeps me awake at nights. The majority totally fails to suggest, much less discuss, why it protects the largest multinational corporation in the same way it protects the new untried entrant, or why the public interest somehow demands that it should.

Nor are the networks acquiring very much programming at all directly from independent producers. Most prime time programming today comes directly from the major studios and distributors. In fact, in the past four years nearly 90 percent of all pilots and series acquired by CBS from outside sources came from such

companies, and over 80 percent of all three networks' prime time schedules is supplied by the major Hollywood studios and distributors. [93]

If the old rules did not achieve the goal of source diversity in network program production, neither have they produced significant creativity in television programming. One need not be an FCC Commissioner or a TV critic to understand that spin-offs, retreads, and theatrical movie rip-offs tend to typify the networks' prime time schedules. It is small wonder that, with true originality at a premium, audiences are deserting network television for cable television in growing, and seemingly irreversible, numbers.

My point is this: true diversity has flourished on cable networks, and on the upstart Fox Network, without the suffocating embrace of the fin/syn rules. Does this mean that the repeal of the rules would transform the television networks in like manner? Arguably not, given the current need for the networks to depend on mass audiences for their revenues. But would their repeal at least inject a modicum of novelty by providing new revenue sources for networks, and giving them an added incentive to bankroll unusual and untested ideas they might otherwise pass up in favor of a surer bet? I believe it would. Above all, given the absence of any credible problem to be avoided by the imposition of these new rules, I believe it would be worth a try.

As a final point it should be noted that the fluidity and highly unstructured character of negotiations in the program supply market will unavoidably entrap the Commission into further regulatory intrusions by the need to clarify and reinterpret whether compliance with its new rules has been demonstrated in different negotiating fact patterns. Given the way deals are made in the real world, trying to straightjacket them into a format that will allow a simple "yes" or "no " answer to the question of whether the rules were complied with is hopelessly fanciful. In this respect the rules prove possibly the most pernicious truism about regulatory micromanagement, and that is that it is seldom sufficient unto itself: instead, it tends to beget seemingly endless generations of yet more regulatory micromanagement.

All of this points out how naive government agencies seem, and how unproductively they act, when they presume to regulate the intricacies of commercial dealings between businesses. And

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[93] CBS Further Comments at 13; NBC Further Comments at 25.

in regulating the buying and selling of prime time television programs, the majority's efforts starkly highlight the cogency of the Network Special Staff's findings that:

> ...[I]t is sometimes charged that agreed-upon contractual terms are "unfair" or onerous to program suppliers. Such claims are, in truth, simply assertions that program suppliers should be paid more rather than less for their product. Because no public interest goal is advanced by giving program suppliers more money for doing the same work, the Commission should be indifferent to such claims. Program suppliers will of course continue to be deeply and earnestly interested in increasing their income at the networks' expense. We do not mean to assert that such an interest is illegitimate, but only that it is a private interest not shared by viewers. [94]

The Network Definition

Having fastened its regulatory clamps on the three older networks, the majority confronts a real dilemma when it comes to dealing with the new Fox Network. Its audience reach, at 90 percent, is indistinguishable for all practical purposes from that of the networks. Like the networks, it has a large number of local affiliates, which it could presumably favor in selling its off-network and first-run syndicated programming. And, even worse (at least, in the majority's logic), unlike the older networks, Fox is vertically integrated into one of the large multinational Hollywood studio/distributors which is heavily engaged in program syndication.

When presented with the question of what to do with an entity that looks more like a network having undue power than the three networks do, what does the majority do? It exempts it. How? By defining a "network" in terms of a number of hours of prime time programming the Fox Network has said it will not distribute for a couple of years at least. Why? That question is a lot more difficult to answer. The first problem is, of course, the fact that the magic number 15 is completely arbitrarily chosen. Even assuming that the majority wanted only to cut Fox a break in establishing the magic number, why 15 hours instead of 16? or 17? or any number short of the average number of hours per week of prime time programmed by the networks? Setting the number at 15 pins Fox to a particular

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[94] Network Special Staff Report, Vol. I, 508.

ceiling that (by amazing coincidence) happens to be precisely the number of prime time hours Fox now plans to fill with Fox network programming anyway for the foreseeable future. But, if the majority's real aim is, as they claim, to promote program diversity, why not give Fox some breathing room to expand its prime time programming should subsequent conditions warrant a change in its plans? Under the current scheme, if Fox happens to exceed its current expectations and wants to broadcast more than 15 hours of prime time entertainment programming, it has to either restructure its overall business, which it has said it cannot do, or come to this Commission for another waiver. And frankly, I cannot imagine placing this Commission in the posture of having to again rule on whether the addition of more specific entertainment programs to a network's prime time schedule would, or would not, serve the public interest.

Nor is the treatment of Fox the only aberration under the new definition. Many of the most popular national cable services are co-owned by the owners of the largest national cable companies. These entities, too, combine the program acquisition, network distribution, and syndication businesses that are the crux of the majority's concern over network "extraction" and market leverage. In the Cable Report, the Commission found enough concern over the anti-competitive effects of this vertical integration to warrant limited program access under specified circumstances by competitors to such entities in individual markets. Yet, despite these cable networks' palpable display of the same characteristics that cause the majority heartburn in broadcast networks, it appears that cable networks are not intended to be included in the definition should they reach the 75 percent penetration level, and, no reason is given as to why they should not be.

The definition has another, even more perverse effect: the 15-hour limit gives the older networks an incentive to drop enough prime time programming to dip below the magic number and thereby escape the onerous entrapment of these new rules. If network prime time entertainment programming is indeed, as the majority claims, the sine qua non of diversity, why adopt a rule that encourages its disappearance from network schedules? The result would be less network programming to affiliates, and therefore less network compensation paid to affiliates. The affiliates, in turn, would have to fill up the new vacancies in their schedules by producing shows themselves or else by buying syndicated shows. Either of these proposition will be costly to the affiliates.

What will the ultimate effect on the affiliates, and on the existing network system, be? No one can tell, but one thing is sure: the majority's decision trifles dangerously with the

existing structure of broadcast television for no reasonable cause.

Let me be clear: in writing this I do not mean to suggest that the Fox Network and the cable networks should be fully subject to the new rules and thus be forced to change their operations to comply with them. Quite the contrary. Fox is bringing to reality the long-sought fourth network, and thereby providing a new lease on life to the predominantly UHF stations that make up its affiliates, and the cable networks are providing a wealth of diverse programming highly valued by consumers. That is diversity, and I would not impede it. I would simply argue that the truncation that the new rules now cast in stone for Fox not only fails to further the majority's stated goals but is totally unnecessary. Neither Fox nor the older networks, despite their audience reach, individually or even collectively can corner the market for prime time programming to the ultimate derogation of the availability of diverse programming. Thus, as Fox itself agrees, neither the Fox Network nor the older networks should be subject to fin/syn rules.

The Four-Year Review

With regard to the majority's decision to review the rules in four years, the courts have held that we must adapt our rules to the nation's needs in a volatile, changing economy. Thus, while it is gratifying that the majority recognizes the need for review, they could hardly do anything else; but what is mystifying is their certainty that four years after the effective date of the order is the precise time it should be done. This certitude is all the more perplexing in light of the majority's deprecation of all sunset or phase-out of the rules in this proceeding because such measures "attempt to forecast events that are inherently unpredictable" and would constitute an "arbitrary dictat[ion]" of the appropriate time for review.

Perhaps it is not inconsistent to say that a phase-out and eventual sunset of the rules would be arbitrary because of the unpredictability of future events whereas establishing a deadline for review in four years is not. Perhaps it is not inconsistent to say that even assuming the establishment of a specific time-lapse of years for review isn't arbitrary, the number 4 is intuitively right. So let us not focus on those propositions. Let us focus instead on the majority's statement that a further increase in the number of program outlets and competition to the networks "may" continue, and if it does, repeal of the rules "may" be warranted.

The record in this proceeding demonstrates beyond any reasonable argument that a multiplicity of competitive

programming outlets already exists. The record demonstrates that they already do buy substantial amounts of programming in competition to the networks, thus constraining the networks' ability to control the market in buying programming. The record demonstrates that independent stations are relying predominantly on first-run syndicated product as opposed to network reruns to anchor their schedules. And the record demonstrates that the independent producers who are the immediate ostensible beneficiaries of these restrictions have dwindled steadily under their embrace, to the point that the vast majority of the prime time entertainment programming supplied to the networks is owned or controlled by the eight largest Hollywood studios.

This, I submit, is enough change to warrant virtual repeal of the rules right now. And if it is not, what higher test could the majority possibly impose? And what else does it anticipate will happen, in precisely four years, to make the case for repeal more cogent? Above all, in tying repeal to a further increase in the number of program outlets and competition, the majority seems to be turning its back on its own finding that network audience reach and revenues are the basis of network dominance regardless of the existence or number of competing channels of programming.

The New Rules on Appeal

While the Commission is generally accorded considerable discretion in setting policy in the highly specialized and complex area of telecommunications, this discretion is not open-ended. Notice and comment rule making procedures require the Commission to respond to all significant points in the record, because otherwise the opportunity to comment is rendered meaningless. [95] In determining whether a particular issue is significant for purposes of such response the courts have held that the "arbitrary and capricious" standard of review applies. [96] Under this standard, comments which, if true, raise relevant points and which, if adopted, would require a change in the agency's rule, cast doubt on the reasonableness of the agency's conclusions and must therefore be considered. [97] In short, the Commission can exercise its considerable discretion in policy making only after fairly considering all the relevant and

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[95] American Civil Liberties Union v. FCC, 823 F.2d 1554, 1581 (D.C. Cir. 1987)

[96] Id., citing Home Box Office, Inc. v. FCC, 567 F.2d 9, 35-36 (1977).

[97] Home Box Office, id., n. 58.

potentially outcome-changing points raised in the comments. It is free to disagree with these arguments, if it can give a reasoned explanation why it does, but it is not free to either ignore them or dismiss them without a reasoned explanation for why it is doing so. In the absence of evidence that the agency has made a reasoned decision based on "reasonable extrapolations from some reliable evidence," the court may not step in to save the rules on appeal by providing the reasoned basis for acting that the agency itself has not. [98]

The majority decision is not reasoned decision-making; it looks at the record in this proceeding with blinders on. The majority ignores the analysis and factual evidence submitted to show that the explosion in video distribution outlets - which the majority does not dispute - eliminates the existence of the supposed harm the rules are intended to address, and instead relies on factors that have no relevance in and of themselves to show the existence of that harm. Having found the harm, it devises solutions that would not work in any event to address it. And it uncritically lumps together in its protective embrace huge multinational corporations as well as the smallest untried entrepreneurs without any suggestion of how the public interest is necessarily advanced by what it is doing.

In voicing these criticisms, I do not for one moment doubt the sincerity of the majority in believing that the rules it adopts will further the cause of diversity. Nor do I discount the value of diversity as a legitimate public policy goal. But sincerity and the legitimacy of diversity as a goal are not enough to take the majority where the record simply will not go.

Because these rules cannot be rationally predicated on remedying an identified harm, they will fail judicial review. [99] And they will fail because the majority has ignored a fundamental duty to rid itself of rules which, because of changes in the market, now produce antithetical results. [100] If nothing else, the majority's decision is likely to produce a milestone case on what constitutes arbitrary and capricious decisionmaking. It is a milestone I assuredly regret.

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98 American Mining Congress v. EPA 907, F.2d 1179, 1187 (D.C. Cir. 1990), citing Natural Resources Defense Council v. EPA, 902 F.2d 962, 968 (D.C. Cir. 1990).

99 HBO v. FCC, supra at 40-42.

100 NAACP v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979).

Conclusion

In the final analysis I should perhaps not fault the majority excessively for its quixotic urge to imagine giants and tilt at windmills, because I too have a quixotic notion. My quixotic notion is that someday the reams and reams of study and analysis that have produced the heretofore overwhelming consensus that the fin/syn rules should be largely repealed will be carefully and dispassionately studied, and the appropriate action will be taken. Perhaps it will be this Commission on reconsideration; more likely it will be after court review. This action will, in my view, truly advance diversity and truly benefit the entire system of over-the-air broadcasting without harming the supply of programming upon which the system depends.

But even as I indulge this vision, I am realistic enough to know that the present, and not the future, must be the focus in assessing these new rules. In this cold light of reality, no other conclusion is possible than that these rules embody bad law, bad economics, and bad policy, and I dissent.

**Separate Statement of Commissioner James H. Quello,
dissenting to the overall result, and concurring in part.**

In the Matter of Evaluation of the Syndication and Financial Interest Rules, MM Docket No. 90-162.

The majority plan in some ways relaxes the financial interest and syndication ("finsyn") rules that for 21 years have restricted the networks, but it would be a mistake to characterize the new rules as deregulatory. Calling the majority plan "deregulation" is like telling an inmate at the end of his jail term that he may leave his cell — so long as he does not venture beyond the prison walls. But in the case of finsyn, the networks have done their time; they deserve to be set free.

I concur in part with the Report and Order because it will provide the networks some measure of flexibility to respond to the challenges of the new media environment. Consequently, I agree that the rules should be eliminated entirely for the non-prime time part of the schedule, that networks should be permitted to own and syndicate in-house productions (including foreign and domestic co-productions), that networks should be able to engage in foreign syndication, and that networks should be permitted to bargain for financial interest and syndication rights in all the programs they air.

On the other hand, the majority plan of the Report and Order retains significant limitations on network participation in the programming market, and imposes complex and, in some cases, redundant "safeguards." Although the Report and Order is being promoted by some as a significant deregulatory step, today's decision will impose onerous new burdens on the networks that had never been part of the FCC's rules and that go far beyond the antitrust consent decrees affecting the three established networks.

So in this proceeding the FCC giveth and the FCC taketh away. This is acting in a bit too mysterious a way for me to accept completely, particularly given the record before us. Consequently, I dissent to the overall result and concur in part.

The Record Supports Virtual Repeal of the Rules

Like a Hollywood production, the majority plan requires the willing suspension of disbelief, for the new and continuing limitations on network activity simply are not supported by the record. Far from re-regulation, the facts presented to this agency overwhelmingly support substantial, if not total repeal of the rules. The Report and Order clearly should be subjected to some kind of reality test.

Of course, it is possible for reasonable people to read the record differently. Certainly there is no shortage of assertions in the myriad pleadings that can be cited to support the new rules. There is little to suggest, however, that the record citations advocating limits on network participation would withstand critical analysis. Here is where a reality test would have helped. As the Department of Justice noted, in a marvel of understatement, "[t]he willingness of producers to spend large amounts of money to keep the rules suggests that significant wealth transfers may be involved" in explaining the studios' position.[1] There is no doubt that all of the parties, including the networks, faithfully advocated positions that serve their own economic interests. To the extent this is true, it is possible for people read the same record yet reach different conclusions. But there is one fact, not fully appreciated by the majority, that makes this record different. It is this: virtually every credible party without a direct financial interest who filed comments in this proceeding supported substantial repeal of the finsyn rules:

— Both the Department of Justice and the Bureau of Economics of the Federal Trade Commission argue that the rules should be repealed. The National Telecommunications and Information Administration also supported substantial modifications with some safeguards.[2]

— Henry Geller, the Commission's General Counsel when the rules were adopted, filed comments and appeared at the *en banc* hearing in support of repeal. He represented various parties, including Action for Children's Television, Black Citizens for a Fair Media and Dr. Everett Parker, widely considered to be the founder of the citizens' movement in FCC matters.[3]

— Various unions, including communications unions, several AFL-CIO affiliates, and the National Education Association support total repeal of the rules.[4] In addition to matters of international competitiveness, these commenters voiced the very real concern that their members will be deprived

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[1]*Comments of the United States Department of Justice*, filed June 14, 1990 at 27.

[2]Although NTIA supported the so-called "two-step" negotiation process, a form of which was adopted by the majority, it did not advocate new restrictions on networks, such as limits on in-house production.

[3]*See Further Comments of Action for Children's Television, et al.*, November 19, 1990; Testimony of Henry Geller, FCC *En Banc* Hearing, December 14, 1990.

[4]Many of these parties previously supported the rules. In fact, the National Education Association wrote to the Commission to clarify that it was not supporting retention of the rules, as other commenters had claimed. *Compare* Letter from Kenneth F. Melley, NEA, to Chairman Alfred Sikes, March 9, 1990 with *Comments of the Coalition to Preserve the Financial Interest and Syndication Rule*, filed March 5, 1990, Attachment A. *See also* Letter from Barbara J. Easterling, Communications Workers of America, to Frances Seghers, MPAA, November 16, 1990 (expressly withdrawing from the Coalition to Preserve the Financial Interest and Syndication Rule).

of the benefits of free over-the-air television if the networks' decline is not counterbalanced by the relaxation of regulations.[5]

— The Media Institute, an independent Washington media think tank advocated total repeal of the rules, as did the Heritage Foundation and Citizens for a Sound Economy Foundation.[6]

Outside commentators, similarly lacking any economic incentive, largely reached the same conclusion. As columnists Rowland Evans and Robert Novak noted, "the preponderance of objective opinion would let [the networks] share in the rerun business."[7] For example, the NEW YORK TIMES, the WASHINGTON POST, the WALL STREET JOURNAL, BUSINESS WEEK, NEWSDAY and the DETROIT NEWS all have editorialized in favor of eliminating the finsyn rules.[8] Many syndicated columnists have reached the same conclusion.[9]

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[5]Those entities advocating repeal of the rules included: the International Brotherhood of Electrical Workers, the Amalgamated Clothing and Textile Workers Union, the National Council of Senior Citizens, the National Education Association, the United Food and Commercial Workers International Union, the American Federation of Television and Radio Artists, the Communications Workers of America, the International Ladies' Garment Workers Union, Service Employees International Union, the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry, the United Brotherhood of Carpenters and Joiners of America, the International Longshoremen's and Warehousemen's Union, the Coalition of Labor Union Women, the Oil, Chemical & Atomic Workers International Union, the American Federation of Grain Millers, the Aluminum, Brick and Glass Workers International Union, the Glass, Moulders, Pottery, Plastics & Allied Workers International Union, and the Air Line Pilots Association.

[6]*See* The Media Institute, PRIME TIME FOR REPEAL (1990) (filed as comments); *Comments of the Heritage Foundation*, March 25, 1991; *Comments of the Citizens for a Sound Economy Foundation*, March 25, 1991.

[7]Evans & Novak, *The Battle Over Television Reruns*, WASHINGTON POST, March 18, 1991 at A11. Press accounts of the issues surrounding broadcast television provide a useful gauge by which to evaluate the comments. Most news stories simply report on the state of the industry, without taking a position on the issue of finsyn (although some do). In any event, most of the articles cited in this statement were filed by commenters and are part of the record. Where articles were not filed by the parties, we may take official notice of the facts reported.

[8]*See The Stale Rules That Stifle TV*, NEW YORK TIMES, November 30, 1990; *Macho King vs. Andre the Giant*, WALL STREET JOURNAL, December 14, 1990; *The F.C.C. Goes Hollywood*, NEW YORK TIMES, March 12, 1991 at A22; *Television's Pot of Gold*, WASHINGTON POST, March 13, 1991 at A16; *Is the FCC Obsolete?* DETROIT NEWS, February 19, 1991; *Deregulation in Focus*, NEWSDAY, April 11, 1991; *The F.C.C. Cages the Networks*, NEW YORK TIMES, April 11, 1991 at A24; *The Newest TV Rerun Game*, WASHINGTON POST, April 11, 1991 at A20; *Free the Networks From FCC Shackles*, BUSINESS WEEK, April 8, 1991 at 100.

[9]*See, e.g.*, Samuelson, *The Networks vs. Hollywood*, WASHINGTON POST, December 12, 1990; Prestowitz, *U.S. Rules, Not Japanese Money, Lost MCA*, WALL STREET JOURNAL, December 3, 1990; Shales, *FCC Syndication Rule Relic of a Bygone Era*, THE HOUSTON POST, December 20, 1990 at E-2; Stern, *How U.S. Squeezes the Networks*, CHICAGO TRIBUNE, February 19, 1991 at 14; Evans & Novak, *The Battle Over Television Reruns*, WASHINGTON POST, March 18, 1991 p. A11; Passell, *Syndication*

Once you get beyond the rhetoric in this proceeding, all the parties must admit one undeniable truth: We do not live in the same media environment as existed in 1970. This key fact changes everything.

The Commission originally adopted the finsyn rules because the three networks were the dominant distributors of original programing to the American public and, consequently, the dominant purchasers of that programming.[10] Neither is the case today. The networks face increasingly successful competition from other conventional broadcasters as well as from a growing array of alternative video technologies. As a result, the networks' significance in the program acquisition market is declining.

Consider the following:

— In 1970, there were 600 network affiliates and 82 independent television stations; by 1989, affiliates numbered 656 and independents (including Fox stations) totalled 339.[11]

— In 1970, there were three national television networks; by 1990, a fourth network was becoming established and industry rumors suggested more might emerge.

— In 1970, the three networks enjoyed more than a 90 percent audience share; by 1990, prime time viewing of the three networks was 57 percent and headed downward.[12]

— The networks' share of national television advertising revenue decreased from more than 60 percent in the late 1970s to less than 50 percent in 1989.

Trek: Journey Continues, NEW YORK TIMES, December 5, 1990 at D2; Schrage, *The Lost Opportunity of Fin/Syn Reform*, LOS ANGELES TIMES, April 18, 1991 at D1.

[10]*Competition and Responsibility in Network Broadcasting, Docket No. 12782*, 23 F.C.C.2d 382 (1970) ("*1970 Report & Order*"), *recon. denied*, 25 F.C.C.2d 318 (1970) ("*1970 Reconsideration Order*"), *aff'd sub nom. Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971).

[11]*See* Crandall, *The Economic Case Against the FCC's Television Network Financial Interest and Syndication Rules* (submitted with Joint Network Comments, June 14, 1990) at 18.

[12]*See Reply Comments of the National Telecommunications and Information Administration*, filed August 3, 1990 at 8-11; *Reply Comments of NBC*, filed December 20, 1990 at 7-8. Average network prime time share is expected to be below 55 percent in 1991. For affiliates in the top ten markets, the share already is at 45 percent. *Id.* Independent analyses suggest that affiliates will drop a share point each year and will reach a 48 total day share by 1998. Paul Kagan Associates, *TV Program Investor*, December 22, 1989. *See also Where the Viewers Are*, ELECTRONIC MEDIA, March 25, 1991 at 10 ("The only provider of programming that has shown clear, substantial viewing gains is basic cable. . . . There is no way a single broadcast network can match the breadth and diversity of so many different programming outlets, and the result gets clearer after every sweeps month.")

During this same period, the network share of total broadcast and cable advertising revenue decreased from 48 percent to 32 percent.[13]

— In 1970, the average television viewer received 6.8 video channels, by 1989, the average viewer received 30.5 channels.[14]

— In 1970, off-network syndicated programming captured over 64 percent of the audience for syndicated programming; by 1990, the off-network audience declined to about 30 percent, while first run programming became increasingly popular.[15]

— In 1970, 2,490 cable television systems had 4.5 million subscribers; by 1990, 10,823 cable systems had about 54 million basic subscribers.

— In 1970, pay cable channels (such as HBO) did not exist; by 1990, such channels had approximately 27 million subscribers.

— In 1970, cable "networks" were virtually nonexistent; by 1990, there were about 90 basic cable networks and 17 pay movie channels.[16]

— In 1970, VCRs did not exist as a consumer product; by 1990, they were installed in 66 million households. This represents about 72 percent of all television households.

Given these vast changes, it should surprise no one that the program acquisition market today is far different than it was in 1970. In the current syndication marketplace, 14 of the top 15 syndicated shows are first-run and not off-network; off-network fare accounts for only 30 percent of viewing of all syndicated programs.[17] Nor is over-the-air television the only outlet for original programming. For the 1990-91 television season, for example, about as many original entertainment series were shown on alternative outlets as appeared on the three networks.[18] The President and

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[13]*Comment of the Staff of the Bureau of Economics of the Federal Trade Commission*, September 5, 1990 at 18.

[14]The Media Institute, PRIME TIME FOR REPEAL 51 (1990).

[15]*Comment of the Staff of the Bureau of Economics of the Federal Trade Commission*, September 5, 1990, Appendix, Table A2.

[16]*Joint Networks Comments*, June 14, 1990, Vol. 1, pp. 77-78.

[17]BROADCASTING, July 23, 1990 at 60. *See Reply Comments of NBC, Inc.*, August 1, 1990 at 6-7; Crandall, *The Economic Case Against the FCC's Television Network Financial Interest and Syndication Rules* (submitted with Joint Network Comments, June 14, 1990) at 17.

[18]In 1990-91, there were 26 original entertainment series distributed as first-run programs, 26 series on cable and 15 series on the Fox network. *Reply Comments of NBC*, December 20, 1990 at 9. *NBC Reply Comments*, August 1, 1990, Appendix A.

co-CEO of Time-Warner has said that "Warner Bros. and Lorimar will be producing more and more for cable. . . . We hope we're not producing less and less for the commercial broadcast networks. *But a good show will always get on somewhere.*"[19] Original programming is increasingly considered to be the "signature" by which cable channels are identified. Cable networks last year spent almost $700 million on original programming, and by 1995, analysts predict that half of all programming expenditures on cable — over $1 billion — will be for original shows.[20] One basic cable channel, Lifetime, has fifteen new series in development, and plans to offer two nights of original prime time programming by early 1992.[21] Similarly, The Family Channel last year doubled its budget for series programming to $100 million.[22]

Because of the growing number of choices, program producers are becoming increasingly flexible about which "conduit" to use to reach an audience. Series have moved both to first run and to cable after leaving networks, while some cable series are also available to the television syndication market.[23] As many made-for-television movies (known in the industry as MOWs) are produced for cable and other sources as for the networks. For the 1990-91 season, it was anticipated that cable networks would air 108 MOWs compared to between 103 and 108 (including mini-series) on the three networks.[24] Understandably, then, the three networks' share of

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[19]ELECTRONIC MEDIA, June 4, 1990 at 20 (Interview with Nicholas J. Nicholas, Jr.) (emphasis added) quoted in *Further Reply Comments of Capital Cities/ABC, Inc.*, December 21, 1990 at 7 n.13.

[20]Goldman, *Cable-TV Networks Strive to Stand Out From the Crowd With Original Programs*, WALL STREET JOURNAL, December 17, 1990 at B1. *See also* Fabrikant, *Channels Seek Identity In Made-for-Cable Films*, NEW YORK TIMES, April 1, 1991 at D8 (In 1991, five cable networks have budgeted approximately $600 million for original programming.).

[21]Walley, *Lifetime Plans Original Prime-Time Block*, ELECTRONIC MEDIA, March 25, 1991 at 3.

[22]*Joint Network Comments* (Vol. I, June 14, 1990) at 81, 86. The Family Channel had seven new series in development.

[23]*21 Jump Street*, previously shown on the Fox Network, was moved to first run syndication following its network run. *The Days and Nights of Molly Dodd*, previously an NBC series, had a post-network three year run on Lifetime. *1st and Ten* and *Dream On*, two HBO original series, also are produced for syndication. *Star Trek: The Next Generation* is a first run series that is essentially a sequel to the NBC program *Star Trek*. *See generally, NBC Reply Comments*, December 20, 1990 at 8-10; BROADCASTING, December 17, 1990; Goldman, *Cable-TV Networks Strive to Stand Out From the Crowd With Original Programs*, WALL STREET JOURNAL, December 17, 1990 at B1, 5. In many respects, the choices are interchangable. ABC's cancellation of the series *Twin Peaks* prompted discussions about continuing the program in first run syndication or as a basic cable series. *Worldvision Floats First-Run 'Peaks,'* BROADCASTING, April 8, 1991 at 47. Additionally, programming executives are exploring the possibility of cooperatively producing programming for simultaneous network and cable distribution. *Cost May Make Bedfellows of Broadcasting, Cable*, BROADCASTING, April 29, 1991 at 27.

[24]*Ex parte letter from Jeff Sagansky to Commissioner Ervin S. Duggan*, March 4, 1991. Budgets for MOWs on cable channels (such as HBO, TNT and Showtime) are often twice that of similar network productions, and, in the aggregate, cable networks spend about the same amount — $322 million — as broadcast networks. *Id.* Goldman, *Cable-TV Networks Strive to Stand Out From the Crowd With Original Programs*, WALL STREET JOURNAL, December 17, 1990 at B5. The number of MOWs purchased by cable

overall program purchasing plummeted from about 74 percent in 1970 to 21 percent in 1989.[25] In addition to original entertainment programming, it also cannot be ignored that cable networks spent almost $2 billion to acquire sports rights in 1989-90.[26]

Given the extent to which the video marketplace has changed already, and without considering the magnitude of change anticipated in years to come, I find it difficult to believe that the majority is not more disposed toward total elimination of the finsyn rules. Indeed, the same three Commissioners that today constitute the majority insisted that the Commission conclude in last year's Report to Congress on Cable Television that "[t]he video marketplace continues to be a highly dynamic sector in the midst of transition."[27] As a result of "existing and potential multichannel competitors," the Report concluded that "we are unwilling to endorse or recommend any drastic or long-term re-regulation." The Report took a broad perspective, noting that "robust competition will more efficiently provide both a better safeguard . . . and a greater diversity of choice that any web of rules and regulations designed to mimic competition or otherwise compensate for its absence."[28]

Needless to say, it is difficult to reconcile the regulatory philosophy of the Cable Report with that embodied in today's Report and Order. There, the Commission found in the face of de facto monopoly cable franchises that regulation is inappropriate because "the degree of market power cannot be quantified precisely," but in the current proceeding the majority imposes a complex scheme of regulation, including some new controls out of some vague notions regarding network market power.[29] Last July, we found that "horizontal concentration and vertical integration produces significant benefits for cable subscribers" because they help provide the financial

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networks doubled during the past three years. Fabrikant, *Channels Seek Identity In Made-for-Cable Films*, NEW YORK TIMES, April 1, 1991 at D8. *See also* Marich, *Hybrid 'Telefeature' Movies Emerging As Global TV Force*, THE HOLLYWOOD REPORTER, April 23, 1990 at 1; Bruno, *Original Programs Booming on Cable*, VARIETY, May 16, 1990 at S-1.

[25]*Reply Comments of the National Telecommunications and Information Administration*, August 3, 1990 at 10.

[26]Presentation of Robert C. Wright to Commissioner James Quello, January 17, 1991.

[27]*Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. 4962, ¶ 13 (1990).

[28]*Id.* at ¶¶ 8, 9.

[29]The Commission's conclusions in this regard are particularly underwhelming in light of the fact that the government agencies responsible for enforcement of the antitrust laws have concluded that the networks lack market power. *See Comments of the United States Department of Justice*, June 14, 1990 at 20-29; *Comment of the Staff of the Bureau of Economics of the Federal Trade Commission*, September 5, 1990 at 18; *Further Comments of the United States Department of Justice*, December 21, 1990 at 3; *Additional Comment of the Staff of the Bureau of Economics of the Federal Trade Commission*, March 25, 1991 at 2.

support for programming,[30] but today, the majority concludes that potential vertical integration by networks is an anticompetitive mechanism that must be limited.

It is particularly striking that the majority urged regulatory restraint in the cable proceeding because of the promise of *potential* competition, yet resists greater deregulation of the networks in the face of real and potentially overwhelming competition. Moreover, the competition the networks face today is particularly unfair since the government's thumb is placed squarely on the Hollywood side of the scale. The majority would keep it there.

The rules' proponents rationalize their regulatory approach by describing the networks as gatekeepers to the mass audience. The ability to control access to the nationwide audience gives the networks unique power, the argument goes, so that government intervention is justified. But "[t]he idea that network power now has to be curbed by the FCC is absurd. It's already been curbed to smithereens."[31]

The majority's analysis of network dominance fails to see the handwriting on the wall, much less read it. The growth of alternatives makes it less than clear that the future of any mass medium is guaranteed. An increasing number of observers have suggested that the networks, at least in their current form, may not survive the decade.[32] WASHINGTON POST television critic Tom Shales recently reported:

> If the '80s saw the decline of the networks, the '90s may well see the fall. It is a common assumption in broadcasting now that at least one of the three broadcasting networks will not live to see the end of the century. The question is whether that network will succumb to pressures from outside or just wither and die on its own.[33]

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[30]*Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd. at ¶¶ 82-84.

[31]Shales, *The FCC and the Threat to Free TV*, WASHINGTON POST, April 8, 1991 at C2.

[32]Some advertising executives have suggested that perhaps within five years the networks' "days as a mass medium will be over." Levine, *The Last Gasp of Mass Media?* FORBES, September 17, 1990 at 9. *See also* Zoglin, Goodbye to the Mass Audience, Time, November 19, 1990 ("The era of the mass TV audience may be ending . . . "); Carter, *Little Improvement in Sight As Networks End Bad Year*, NEW YORK TIMES, December 24, 1990 ("a senior network executive, who insisted on remaining anonymous [stated,] 'We're presiding over networks as they head out of business.'"); Werts, *Look Who's Watching*, NEWSDAY, December 23, 1990 ("the networks are dying, and single-interest cable channels are premiering monthly"); Mahoney, *Network Woes Are Barter's Gain*, ELECTRONIC MEDIA, March 25, 1991 at 16 (According to Tim Duncan, executive director of the Advertiser Syndicated Television Association, the networks' ability "to deliver 99 percent of the nation at the flip of a switch . . . isn't the case in many network dayparts anymore. That doesn't exist outside of prime time and shortly will not exist in prime time.").

[33]Shales, *The Endangered NBC Peacock*, WASHINGTON POST, March 29, 1991 at B2.

But Shales also has noted, "If the networks are doomed to fade away according to the natural laws of the economic jungle that is one thing. But there is nothing natural about the Fin-Syn rule. It's a relic of another era, an idea whose time has gone."[34]

The "mass audience" is no longer what it once was. As declining network revenues attest, advertisers are becoming less inclined to spend large sums of money to reach a generalized audience. Rather, they are interested in targeting a selected group of viewers — hopefully those most disposed toward buying the product. They increasingly do so by purchasing "bundled media" campaigns, which utilize a variety of media (*e.g.*, magazines, specialized television channels and books) to aggregate a selected group of consumers.[35] This fact helps explain why the cable television advertising market has remained strong at the same time the networks experienced sharp declines.[36] And, although you would not know it by their comments in this proceeding, it is a point that has not been lost on the studios. In 1990 some major studios reduced their expenditures for network advertising and increased their spending on cable channels.[37] It is a potent indicator of where the studios believe they will find the viewers.[38] Now *there* is a reality test for you.

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[34]Shales, *FCC Syndication Rule Relic of a Bygone Era*, THE HOUSTON POST, December 20, 1990 at E-2.

[35]Levine, *The Last Gasp of Mass Media?* FORBES, September 17, 1990 at 8-10. *See also Group W To Offer 'One Stop Shop' To Advertisers*, BROADCASTING, September 24, 1990 at 72; King, *Gannett Will Take Another Shot At Selling Cross-Media Packages*, WALL STREET JOURNAL, September 28, 1990 at B6; *More Viewers, Fewer Ads*, NEW YORK TIMES, April 7, 1991 at 27 ("People scan television the way aborigines scan the horizon. They flip channels and never really watch anything. The advertisers know this and are backing away. They want more targeted media.").

[36]For example, the USA Network (which is jointly owned by Paramount Communications, Inc. and MCA, Inc.) enjoyed a 1990 increase in ad revenues of 33 percent. Over all, basic cable advertising billings rose more than 20 percent. *See* Goldman, *Cable TV's Ratings and Ad Revenue Grow*, WALL STREET JOURNAL, November 5, 1990. *See also* Dempsey, *Basic Cablers Soar in Brisk Ad Climate*, VARIETY, May 13, 1991 at 47; Walley, *Cable Bounds as Networks Stumble*, ADVERTISING AGE, January 28, 1991; Greenstein, *Cable Programers Expect Bullish Year*, ELECTRONIC MEDIA, January 14, 1991; Gerard, *Industry Outlook Viewed as Gloomy*, NEW YORK TIMES, December 11, 1990; Dempsey, *Growth of Basic Cable's Steady*, VARIETY, September 17, 1990; Fowles, *The Upheavals in the Media*, NEW YORK TIMES, January 6, 1991.

[37]Whatever the studios tell this Commission in their role as entertainment producers, it must be remembered that they also are consumers of advertising time to promote their theatrical releases. During the past year, Columbia Pictures reduced its network advertising budget by 8 percent, while increasing spending in syndication by 195 percent and on cable networks by 31 percent. MCA cut its network budget by 10 percent while boosting syndication spending by 69 percent and cable advertising by nearly 11 percent. Paramount increased cable expenditures by 30 percent and syndication purchases by more than 18 percent, while network media buys rose by only 10.7 percent. Twentieth Century Fox increased its purchases of cable ads by almost 100 percent. *See Movie Advertising: Enough to Go Around?* BROADCASTING, April 1, 1991 at 61.

[38]*See Where the Viewers Are*, ELECTRONIC MEDIA, March 25, 1991 at 10 ("The only provider of programming that has shown clear, substantial viewing gains is basic cable.")

The upshot of this is that free over-the-air television is threatened unless sources of revenue other than advertising can be tapped. The theme of many of the comments in this proceeding and of a startling number of press accounts is that 1990 was the networks' worst year ever.[39] This fact is not an aberration. It cannot be explained away by the recession, the cost of Persian Gulf War coverage or by the prices some networks paid for sports packages. The networks' decline is more accurately understood as part of a fundamental change in the environment in which they operate.[40] As audiences for the national networks continue to decline, so will their revenues; as cable channels with dual revenue streams pay large sums for the rights to sports events, networks will be forced to pay higher prices to compete; and as news events occur in an increasingly complex world, networks will need the financial wherewithal to provide comprehensive news coverage on par with that available on cable television.

Unlike the theoretical and intangible loss of programming diversity feared by the studios should the networks be freed from regulatory restraints, the loss to diversity from the networks' decline is both real and direct. CBS lost more than $200 million in 1990 and recently announced a first quarter 1991 operating loss of $54.6 million. This prompted the network to layoff 400 employees, including up to 140 in the news division. It is anticipated that the network will shut down domestic news bureaus in Dallas and Atlanta, as well as foreign bureaus in Johannesburg, Rome and Beijing.[41] Even as the top-rated network, NBC's profits have slipped by a reported two-thirds, and it, too has experienced layoffs.[42] NBC has announced the closure of some domestic news bureaus and there has been speculation that the network might eliminate its news division.[43] Similarly, the economics of network broadcasting has forced Capital Cities/ABC to make cuts reported to be in the hundreds of millions of

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[39] *See Comments of CBS, Inc.*, June 14, 1990 at 31-36; *Reply Comments of NBC, Inc.*, August 1, 1990 at 8-14; *See, e.g.*, Lippman, *CBS Cutbacks Expected to Include 400 Layoffs*, LOS ANGELES TIMES, March 30, 1991 at D3; Carter, *Little Improvement in Sight As Networks End Bad Year*, NEW YORK TIMES, December 24, 1990; Tyrer, *No Quick End Foreseen to Network Economic Woes*, ELECTRONIC MEDIA, January 14, 1991 at 20; Mermigas, *Analyst Predicts Record Loss for CBS*, ELECTRONIC MEDIA, January 28, 1991; *Profits Fall at Capital Cities/ABC*, NEW YORK TIMES, February 5, 1991; Shales, *The Endangered NBC Peacock*, WASHINGTON POST, March 29, 1991 at B1; *NBC Reports Revenue Decline and Earnings Drop for 1990*, BROADCASTING, January 28, 1991.

[40] Shales, *CBS Posts Huge Loss, Eliminates 400 Jobs*, WASHINGTON POST, April 6, 1991 at D4 ("With increased competition from cable, pay TV and VCRs, network ratings and profits began declining in the '80s, and all three continue to undergo radical downsizing as they face sobering new economic realities.").

[41] *Id.* at D1; Carmody, *The TV Column*, WASHINGTON POST, April 4, 1991 at D6; Lippman, *CBS Cutbacks Expected to Include 400 Layoffs*, LOS ANGELES TIMES, March 30, 1991 at D3; Hall, *CBS May Close 4 Bureaus to Curb News-Gathering Costs*, LOS ANGELES TIMES, April 3, 1991 at F2.

[42] Shales, *The Endangered NBC Peacock*, WASHINGTON POST, March 29, 1991 at B2.

[43] Gay, *Will Network News Ever Be The Same?*, NEWSDAY, January 30, 1991.

dollars.[44] ABC is closing three domestic news bureaus, may reduce staff in others, and has delayed the introduction of a five-hour overnight newscast that was scheduled to begin last January.[45] In addition to network cuts, CBS announced a reduction in affiliate compensation of 20 percent for 1991, and NBC has announced a 10 percent cut.[46]

This is not to say that the Commission is obligated to ensure the financial health of the networks. By the same token, the public interest does not require that we create or maintain a regulatory subsidy for Hollywood producers.[47] But to ignore the fact that our regulations make the over-the-air broadcast industry less competitive at a time when it is facing its greatest threat is to be blind to our mandate to make available "a rapid, efficient, Nation-wide, and world-wide . . . communication service."[48]

Needless to say, as network news cutbacks demonstrate, reducing the profitability of networks has had the effect of hampering their ability to serve the public through diverse programming. The same is true of entertainment fare. For example, the networks have essentially withdrawn from programming during the morning daytime period "because the return on investment is no longer there."[49] Generally, the networks' flexibility in programming choices has been constrained by the economic outlook.[50] One consequence of this is a greater reliance by the networks on the less expensive "reality-based" programming.[51] In the roster of shows currently under development, all three networks have announced plans for "a larger dose of reality

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[44]Mermigas, *Cost-Cutting Won't Save Networks*, ELECTRONIC MEDIA, November 26, 1990.

[45]*Capital Cities/ABC Third-Quarter Net Declined 11%, Reflecting Slump in Ads*, WALL STREET JOURNAL, October 24, 1990.

[46]Tyrer, *No Quick End Foreseen to Network Economic Woes*, ELECTRONIC MEDIA, January 14, 1991 at 28.

[47]*See National Association of Independent Television Producers & Distributors v. FCC*, 516 F.2d 526, 534 (2d Cir. 1975) ("[W]hile a purpose of PTAR[ ] was to encourage independent production for access time, it was not to improve the position of the producers against the networks. Nor was there any intention to make the networks poorer. What is prohibited is that these be the goals.").

[48]47 U.S.C. § 151.

[49]*Syndication's Growing Clout*, BROADCASTING, March 25, 1991 at 92. *See also* Johnson, *'CBS This Morning' May Go Off Into the Sunset*, USA TODAY, April 30, 1991 at D3.

[50]Carter, *In TV Ratings Battle, NBC Finds Constraints*, NEW YORK TIMES, January 8, 1991.

[51]*Goodbye to the Mass Audience*, TIME, November 19, 1990 ("To avert such a disaster, the networks are looking for ways to reduce programming costs. Reality shows like NBC's *Unsolved Mysteries* and CBS's *Top Cops* are becoming more common, partly because they are cheaper to produce."); Carter, *TV's Mid-Season: Modest Ambitions*, NEW YORK TIMES, January 16, 1991 ("Cost considerations also account for the prevalence of programs appearing in prime time solely because they are cheap.").

programing than usual."[52] This is not to suggest that reality-based programming is contrary to the public interest. Some may indeed be fine programs. But it is not a healthy thing for our national networks to base prime time programming decisions on their ability to get a few shows on the cheap. Such a climate hardly contributes to diversity. Nor does it help local affiliates that depend on a strong network schedule to maintain their ability to serve their communities.[53]

It is interesting to note that over the seemingly endless course of this proceeding, as the commenters have come to realize that some modification in the rules is inevitable, all have acknowledged that change is necessary to help the networks.[54] But they propose varying levels of network involvement, all — of course — in the name of the public interest. Perhaps it is too cynical to suggest that where the commenters draw the line on network entry depends on their line of business. But whatever may be the origin of the parties' concern, my question is this: Can any commenters demonstrate that their fears or speculations about how the networks might behave if allowed to compete fully match what already is happening to network television? Can the majority do so? The answer to this question is critical because the future of free over-the-air television is at stake.

The Public Interest Does Not Support Meddling in the Contracting Process

The Report and Order adopts a complex set of rules designed to protect suppliers of network entertainment programming and buyers in the off-network and first run syndication market. With respect to program suppliers, the majority has fashioned complicated anti-"extraction" safeguards. The intent is to prevent the networks from taking financial interests or syndication rights without compensating the producers.

Contrary to the majority's inclinations, the record simply will not support such an overbearing governmental presence in the contracting process. There is little evidence to suggest that extraction was a major problem twenty one years ago. If anything, once you get beyond the anecdotes, the evidence goes the other way.[55] The

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[52]Tyrer, *Networks Boost Pilot List by 25%*, ELECTRONIC MEDIA, March 25, 1991 at 1; *Networks Unveil Pilot List for Fall Season*, ELECTRONIC MEDIA, March 25, 1991 at 108 (CBS announced four reality-based shows under development, while ABC and NBC each listed six.).

[53]The reduction of affiliate compensation also hurts local broadcasters, many of whom depend on network payments as a major source of income. This is particularly true in smaller markets. *See* Tyrer, *No Quick End Foreseen to Network Economic Woes*, ELECTRONIC MEDIA, January 14, 1991 at 28.

[54]*See, e.g., INTV Comments in Response to Order Requesting Further Comment*, March 25, 1991 at 1; *Further Comments of Westinghouse Broadcasting Company, Inc.*, March 25, 1991 at 1-2; *Supplemental Further Comments of the Coalition to Preserve the Financial Interest and Syndication Rule*, March 25, 1991 at 2-3; *Program Producers and Distributors Committee Response to Order Requesting Further Comment*, March 25, 1991 at 3.

[55]The Network Inquiry Special Staff found that "like any other property right, [syndication rights or interests] were available for a fee and the networks obtained them by paying compensation to the

recollections of former network executives who now work for studios cannot be considered the best evidence, even if their prior experience is thought to be relevant today.[56] The fact that the Justice Department charged in the mid-70s that extraction took place is not probative, since those charges were never tested in court.[57] In any event, the Justice Department's position *today* is that the networks lack the market power to extract financial interests and syndication rights.[58] The extraction argument simply is not credible in today's competitive market. The networks compete aggressively for hit shows. If one demands too much from a producer, that person may go to another buyer.[59]

If this record contains evidence of extraction, it is in the studios' practices when a hit series is up for renewal. In perhaps the most publicized examples, demands were placed on NBC that it pay bonuses of $100 million and $120 million to renew *The Bill Cosby Show* and *Cheers*.[60] Studios do not always wait for renewal. When a show becomes a hit, networks are often asked to increase the license fee before the end of the option period.[61] Studios also will use the leverage they command by virtue of

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suppliers." NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION (Vol. 2, 1980) at 729; Second Interim Report by the Office of Network Study, Part I, *reprinted in* H. REP. NO. 281, 88th Cong., 1st Sess. 65 (1963); Second Interim Report by the Office of Network Study, Part II, 211 (1965). *See* Crandall, *The Economic Case Against the FCC's Television Network Financial Interest and Syndication Rules* (submitted with Joint Network Comments, June 14, 1990) at 8-12; *Ex Parte Letter from Capital Cities/ABC, Inc. to Donna R. Searcy*, April 1, 1991; Crandall, *FCC Regulation, Monopsony, and Network Television Program Costs*, 3 BELL J. ECON. & MANAGEMENT SCIENCE, 483 (1972).

[56]FCC *En Banc* Hearing, December 14, 1990 (Testimony Robert Daly and Barry Meyer). If anything, the emphatic statements by studio executives that they used to take rights from producers without compensating them should do little to calm the nerves of independent producers, who cuuently must turn to the studios for financing.

[57]The allegations of extraction were made in an identification of evidence in *United States v. CBS, Inc.*, Civ. No. 74-3599-RJK (C.D. Cal). However, the Commission has found that "Justice Department pre-trial pleadings . . . lack any probity since these allegations have never been established in a court." *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 74, 85 (1985).

[58]*Justice Department Comments*, June 14, 1990 at 20-24; *Further Comments of the Department of Justice*, December 21, 1990 at 7.

[59]The record contains numerous examples of this phenomenon. *E.g.*, Testimony of Thomas Carter, Jeff Sagansky and John Agolia, FCC *En Banc* Hearing, December 14, 1990; *Further Reply Comments of Capital Cities/ABC, Inc.*, December 21, 1990 at 7-8.

[60]NBC reportedly settled on a per-episode price of $3 million for *Cosby*. Variety, April 4, 1990 at 50; HOLLYWOOD REPORTER, March 30, 1990 at 1, 66. The demand of $120 million to renew *Cheers* represented more than half of NBC's 1990 profits. Carmody, *The TV Column*, WASHINGTON POST, February 11, 1991 at C6. This year, NBC paid $50 million to renew *Cosby*; $40 million to renew *The Golden Girls*; and $70 million for another two seasons of *A Different World*. *'Cosby,' 'World' Renewed*, ELECTRONIC MEDIA, May 6, 1991 at 1.

[61]*See, e.g., Comments of CBS, Inc.*, June 14, 1990 at 22-24; Affidavit of Jeffrey Sagansky at 6-7 (describing increase demanded for series *Murphy Brown*).

having a hit program to obtain network concessions involving less popular shows or to obtain future commitments. According to one studio executive quoted in VARIETY, "[t]he combined clout of Lorimar and its sister company Warner . . . lets the studios bulldoze iffy product onto the air."[62] As a network programmer told the Commission last December:

> At some point, I think someone should take my blood pressure after I leave Mr. Daly's office, knowing that through the Warner-Lorimar connection, he controls nine of our prime time shows. Nine. That's what I call market power or leverage or intimidation or coercion.[63]

Each of the networks has provided examples of this. To renew *Murder, She Wrote*, CBS had to accept a 60 percent increase in the license fee, agreed to purchase 39 episodes of yet-to-be-developed shows from Universal Television, and agreed to buy an undeveloped series and two MOWs from a company owned by Angela Lansbury (the star of *Murder, She Wrote*).[64] CBS also claims that renewals of *Dallas*, *Falcon Crest* and *Knots Landing* were tied together by Lorimar. Consequently, the network was effectively blocked from cancelling *Falcon Crest* or from renewing the other two series for a single year.[65] NBC reported that to obtain a two year renewal from Disney for *The Golden Girls*, it had to guarantee a favorable time slot for the show, purchase three blind series, and renew another show, *Empty Nest*, at an higher license fee.[66] NBC agreed to buy two blind series from Paramount in exchange for the renewal of *Family Ties*, and one blind series from Warner to obtain the renewal of *Night Court*.[67]

The majority dismisses this evidence as pertaining only to "the industry's most successful producers and programs" and to "license renegotiations." Report & Order ¶ 46. To this, all I can say is, "What's your point?" The majority apparently agrees that the major studios can exercise their clout at the expense of the networks, and ultimately, independent producers. To the extent major studios can prolong the life of programs that otherwise have run their course or to obtain commitments for new shows, it drives independent producers out of prime time. Industry sources point out that "the shrinking shelf space for independents is partly because of the majors' use

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[62]VARIETY, June 27, 1990 at 49. *See also* Koch, *Television's Independents: Working on a Slippery Slope*, NEW YORK TIMES, September 30, 1990 at F10 ("The most powerful form of pressure available to the studios is a threat to move a hit show to another network or to take future projects elsewhere.").

[63]Testimony of Robert Iger, FCC *En Banc* Hearing, December 14, 1990. *See also* Testimony of John Agolia ("I can think of six shows right now on the schedule of the three networks that were forced to be renewed despite low ratings and the audience rejection.").

[64]*Comments of CBS, Inc.*, June 14, 1990 at 27; Affidavit of Jeffrey Sagansky at 8.

[65]*Id.* (Affidavit of Jeffrey Sagansky) (*Dallas* and *Knots Landing* were each given two year renewals).

[66]*Reply Comments of NBC, Inc.*, August 1, 1990 at 26.

[67]*Id.*

of their growing concentration of power to secure as much of that space as possible" and partly because the studios "have been bidding up the price of key talent, the writer-producers, making it harder for new competitors to break in."[68] Consequently, only 14 percent of the 1990 prime time schedule on ABC, NBC, CBS and Fox came from truely independent producers — those who did not rely on a major studio, network or large diversified media company for financing.[69] As the president of Columbia Pictures Television has predicted, "Within the next five years or so, the bulk of the programming will be provided by four or five major studios."[70]

If I ignore this evidence and accept the majority's assumption that the networks have the power to extract valuable rights for nothing, I doubt the safeguards in the Report and Order will have much effect. As the Department of Justice concluded, "[i]f networks have the power to 'take' these financial interests from producers as a price for putting their programs on the air, it is reasonable to expect that producers would 'offer' these rights to the networks when they begin negotiations with the networks."[71] Thus, if producers must initiate co-productions for in-house arrangements, they will do so. If networks may acquire backend rights only in the second stage of a negotiation, studios that fear network programming decisions will make sure that there are some rights left to give up.

As is more likely, Commission intervention will disrupt the contracting process, probably to the detriment of the networks. "Regulation of the contracting process is difficult under any circumstances, but it is particularly difficult when the subject products are highly individualistic and suppliers have differing resources and needs."[72] In the case of program acquisition, there is ample information in the record that a two-step negotiation process will effectively preclude the networks from bidding for backend rights.[73] By the time the network and the producer have reached a licensing agreement, whatever rights there are to be sold probably already have been.[74] Moreover, the Department of Justice noted that regulating the bargaining process is likely to be "extremely difficult and costly to administer."[75]

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[68]Koch, *Television's Independents: Working on a Slippery Slope*, NEW YORK TIMES, September 30, 1990 at F10.

[69]*Id.* This figure was down from 57 percent in 1988.

[70]*Id.*

[71]*Further Comments of the Department of Justice*, December 21, 1990 at 8-9.

[72]*Id.* at 9.

[73]*Id.* at 10. *See Comments of Capital Cities/ABC, Inc.*, November 21, 1990 at 8-16, 22; *Further Comments of CBS, Inc.*, November 21, 1990 at 13-18 (and Appendix C, Affidavit of William B. Klein); *Comments of NBC, Inc.*, November 21, 1990 at 24-28.

[74]*Further Comments of CBS, Inc.*, November 21, 1990 at 16-17 ("Thus, *over 94 percent* of CBS's outside-supplied pilots and series from 1987 to the present were licensed from producers who (1) had their own in-house syndication organizations or (2) were parties to 'pre-sale' financing deals with a major

In light of these considerations, I must question why the Commission would ever get involved in assessing the relative bargaining power of Hollywood versus the networks. We simply have no statutory mandate to serve as a referee between these two powerful interests. The only conceivable jurisdictional rationale is that by intervening in the contracting process, the Commission will somehow stimulate the production of more "creative" or "diverse" programming for the viewing public. But I simply am at a loss to understand how we, as policymakers, are to assess such intangibles in this context. One thing is clear, however. The current record does not support governmental intervention in this area.

The Creativity Debate

One of the studios' primary arguments in support of the rules' retention is the notion that network ownership must be avoided in order to foster creativity in program production. The majority swallowed this argument hook, line and sinker, as the Report and Order's repeated and uncritical references to "diversity" attest. Yet I have never been entirely clear on what this means. I asked one executive from an independent production company, who had been urging me to preserve creativity and quality in television, exactly how network involvement would have changed his company's most successful show — *The A Team*. He was stuck for an answer. Yet even if he had been able to describe the particular ways in which barring a network financial interest improved *The A Team*, I am not at all certain I would want my public interest calculus in this proceeding to turn on that answer.

This is not a trivial point; it goes to the heart of the Report and Order. The majority treats the notion of "diversity" as a religious icon — invoking it countless times without once seeking to define it or giving an example. Although I can agree, as a general proposition, that diverse and creative programming is in the public interest, that does not relieve the Commission of the burden of explaining the nature of the diversity it is seeking to promote in *this* proceeding or of describing the ways in which the regulations will attain their purported objective.[76] Courts have made clear that the

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studio or other large distributor. CBS knows of only four instances (less than three percent of all outside-supplied pilots and series) during the entire 1987-1990 period in which the license fees *might* have been negotiated, and the series ordered, prior to the packager having acquired full financing through the sale of backend rights.") (citations omitted, emphasis in original).

[75] *Further Comments of the Department of Justice*, December 21, 1990 at 11. As the Department pointed out:

> The same type of detailed regulatory oversight would also be required if the Commission were to implement a regulation requiring that all negotiations over network acquisition of financial interests and/or syndication rights be initiated by the program producer. The Commission would be forced to decide, in the context of a complex negotiating process, which party "really" initiated the subject.

Id. at 10.

[76] Although the majority comes closest to at least defining its policy goal when it characterizes diversity as "a wide range of voices and a wide variety of cultural influences," Report and Order ¶ 14, it

Commission may not base rules on a "'fanciful threat,' unsubstantiated by the record or by two decades of experience." *Century Communications Corp. v. FCC*, 835 F.2d 292, 295 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988), quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1457 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

Despite the need for specific record support, neither the parties nor the majority has been able to explain to me why program quality or diversity might be threatened by elimination of the financial interest and syndication rules. Is television that much improved, after two decades of limitations on the networks? Critic Tom Shales recently pointed out:

> In the 1973-74 season, for instance, this was the CBS Saturday night lineup: "All in the Family," "M*A*S*H," "The Mary Tyler Moore Show," "The Bob Newhart Show" and "The Carol Burnett Show." Incredible! Networks today are lucky to have that many good shows in their entire week's offerings.[77]

It is particularly revealing that most of the programs on this list were developed before the rules went into effect. Are we really better off today?

The confusion surrounding the "creativity debate" most likely stems from the fact that the parties have shifted the meaning of this issue since the rules were adopted in 1970. When it promulgated the Report and Order, the Commission was concerned about the evolution of the programming market toward licensing arrangements and away from single company sponsorship. The reviewing court described this shift away from sole sponsorship as "the single most essential fact" that demonstrated network control. *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470, 482 (2d Cir. 1971). It pointed out that the networks "directly controlled" programming either by in-house production or by "'spot' advertising" in which the program is supported by "many sponsors" as opposed to "one or two advertisers."[78]

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makes no attempt to show how its purported goal will be met. Why, for example, will viewers gain a different cultural perspective from having Paramount own 25 percent of an independent producer's program than from having ABC own a similar percentage?

[77]Shales, *The Mary Memory Tour*, WASHINGTON POST, February 18, 1991 at C1.

[78]442 F.2d at 482. The network consent decrees are based on the same premise. *See, e.g., United States v. NBC*, 41 Fed. Reg. 51992, 52018-19 (1976) (Competitive Impact Statement). The focus on sponsorship in the 1970 proceeding has led to some confusion in the record before us. Some parties to the current proceeding assert that the networks acquired backend rights in 97 percent of the time before the rules were adopted. *E.g., Supplemental Further Comments of the Coalition to Preserve the Financial Interest and Syndication Rule*, March 25, 1991 at 7. This figure, however, relates to programs produced in-house or supported by spot advertising. With respect to financial interests, the networks held profit participations in approximately 60 percent of their shows in the years preceding the rules. Generally the networks would own an approximate 25 percent interest in a given show. With respect to distribution rights, the networks obtained foreign or domestic distribution rights in between 25 and 30 percent of the programs on their schedules. *See generally* Arthur D. Little, Inc., TELEVISION PROGRAM PRODUCTION, PROCUREMENT, DISTRIBUTION AND SCHEDULING (1969).

There is one significant problem with this reasoning: I am not at all certain that the "good old days" of single sponsorship were the high point of creative freedom for producers. During what is commonly referred to as the Golden Age of Television, "anthology writers and directors found sponsors and their agencies increasingly intent on interfering with script matters, dictating changes, vetoing plot details."[79] According to television historian Erik Barnouw, sponsors exerted "a choke-hold on anthology drama" that drove the most talented writers and directors out of the television business and into theatrical films and other endeavors.[80]

Quite often, sponsors would intervene in the creative process simply to avoid controversy, but there were other motivations as well. In one early television series, *Man Against Crime*, the writers received mimeographed instructions from the sponsor — Camel cigarettes. The writers were told, for example, that characters should smoke cigarettes gracefully, not "puff[ ] nervously" and that a cigarette should not be given to a character to "calm his nerves" since that might suggest a narcotic effect.[81] The instructions were quite extensive: "Do not have the heavy or any disreputable person smoking a cigarette. Do not associate the smoking of cigarettes with undesirable scenes or situations plot-wise."[82] The writers were also given advice on plot elements:

> It has been found that we retain audience interest best when our story is concerned with murder. Therefore, although other crimes may be introduced, somebody must be murdered, preferably early, and with the threat of more violence to come.[83]

But the writers were not permitted to introduce just any "other crime." Arson was to be avoided because it could remind the audience of fires caused by cigarettes.[84]

When it adopted the finsyn rules, the Commission apparently did not appreciate these effects of single sponsorship. Instead, it saw spot advertising as a consolidation of network control and predicted that with the new rules, "the trend toward multi-sponsored programs can be reversed." *Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d at 482-83. This prediction was wrong in that spot advertising continues to be the industry norm. It also was incorrect with respect to small independent producers, who typically depend on major studios for production facilities

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[79]E. Barnouw, TUBE OF PLENTY 165 (1977).

[80]*Id.* at 165-66.

[81]*Id.* at 132.

[82]*Id.*

[83]*Id.*

[84]*Id.*

and financing. In exchange for this support, independent producers often give up the copyright to the program being produced, as well as other aspects of creative control.[85]

The bottom line is, if you are an independent producer, *somebody* is always going to acquire a degree of creative control over the production. The question is whether it is better from a public interest perspective to encourage such control by advertisers, major studios or networks. As noted above, I have my doubts about the level of creative freedom that existed under the single sponsorship regime before the rules were adopted. And currently there are some indications that the degree of creative freedom may be diminished as major studios increasingly come under foreign control.

Within a few hours of the announcement that MCA was being acquired, the president of Matsushita told the press that "Japan bashing" films should "not emerge" from Universal or anywhere else.[86] The statement caused such uneasiness in Hollywood "about having an occupying army in our cultural front yard, Variety blared a Japanese headline, translated 'Buyer Beware.'"[87] As one outside observer noted, "it will be one more step in the process where some movies don't get made."[88] Indeed, there are reports that screenwriters for an upcoming Universal film about an American baseball player in Japan are taking "unusual pains" to avoid offending Asian sensibilities.[89]

This is not to suggest that foreign ownership of major studios will decimate the creative freedom of producers. There is not sufficient information in the record to resolve this issue one way or the other. But it raises a question about whether network ownership of some backend rights is necessarily worse by comparison. Certainly no one in this proceeding has asserted that the networks might impose any kind of uniform cultural outlook.

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[85] *See Reply Comments of the Writers Guild of America, West*, August 10, 1990 at 28-31; *Further Reply Comments of Capital Cities/ABC, Inc.*, December 21, 1990 at 14; Further Comments of CBS, Inc., November 21, 1990 (Appendix C, Affidavit of William B. Klein) ("the studio/syndicator typically acquires *all* ownership and distribution rights to a program . . . including the right to license the program to the networks"). *See also* remark of Marcy Carsey, quoted in J. Gerard, *Producers Carsey and Werner: What Have They Done For Us Lately?*, NEW YORK TIMES MAGAZINE, November 25, 1990 at 80 ("When you share your financial risk with a studio, you give away part of your creative control, too.").

[86] Cieply and Citron, *Universal's 'Diamond' in the Rough*, LOS ANGELES TIMES CALENDAR, February 5, 1991 at F1.

[87] Dutka and Easton, *Japan is Hollywood's Brave New World*, LOS ANGELES TIMES CALENDAR, December, 23, 1990 at 3.

[88] *Id.*

[89] Cieply and Citron, *Universal's 'Diamond' in the Rough*, LOS ANGELES TIMES CALENDAR, February 5, 1991 at F1.

As a matter of fact, the evidence before us tends to suggest that network involvement does not restrict the creativity of producers. Contemplating a significant change in the finsyn rules, producer Steven Bochco was quoted as saying, "All it's going to change is who participates in the financial pie, and you'll see the same people doing the same stuff they always have."[90] Producer Barney Rosenzweig made the point another way: "Most producers have been so abused by the studios that I can't see how having the networks count the money will be any worse. . . . [T]heir accounting methods can't be any less honest than the major studios."[91]

These points were confirmed, if a bit indirectly, during the Commission's *en banc* hearing last December. Thomas Carter, producer of the ABC series *Equal Justice*, urged the Commission to retain the finsyn rules to ensure that independent producers would not be stifled. He noted that the series was given the "green light" only because he threatened to take the project to another network — a statement that was more revealing than he realized. In any event, Mr. Carter concluded:

> If ABC had owned my project we would not have been able to take that position and my show might never have made it to the screen.
>
> Putting all the decision-making in the hands of monolithic committees and like-minded monopolies will kill diversity, stifle innovation, and stagnate quality. This must not be allowed to happen. You must ensure the survival of competition in programming or our TV sets will surely become windows to the "vast wasteland" that Newton Minow wrote of some twenty years ago.[92]

The ironic counterpoint to this impassioned statement is that ABC *does* own the copyright to *Equal Justice*, having acquired ownership from Orion Pictures.[93] Apparently the heavy hand of network domination is not so ominous if the producer is unaware of its grasp. As Mr. Carter noted in response to a question, "anything that was entered into with those companies, which I am not aware of, had no effect on the position that I have as a producer."[94]

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[90]Tyrer, *No Quick End Foreseen to Network Economic Woes*, ELECTRONIC MEDIA, January 14, 1991 at 20.

[91]Kissinger, *FCC Fuels Indie Fears as Finsyn Nears Finale*, VARIETY, March 4, 1991.

[92]Statement of Thomas Carter, FCC *En Banc* Hearing, December 14, 1990.

[93]*Further Reply Comments of Capital Cities/ABC, Inc.*, December 21, 1990 at 13. Apparently, the original holder of the copyright to *Equal Justice* was Orion Pictures, the studio that provided financing for the series. When the studio experienced financial difficulties with the show, it sold the ownership rights to ABC, making it an "in-house" production.

[94]Statement of Thomas Carter, FCC *En Banc* Hearing, December 14, 1990.

Realistically, the networks must maximize the creative freedom of the producers of its product. They have a powerful financial incentive to obtain the best programming possible since each prime time rating point equates to $100 million in advertising revenue over the course of a season.[95] The three networks bid aggressively against one another, as well as against the studios, to obtain the services of top-line producers with proven track records. To obtain an edge, the networks often must make series commitments without ever having seen a pilot or a script.[96] As competition for viewers has increased, the networks have offered increasing amounts of creative freedom, often to attract successful producers in other media, such as theatrical film.[97] Top film directors, such as Steven Spielberg, David Lynch, Tim Burton, John Sayles, David Mamet, Richard Donner, Tony Richardson and Robert Zemeckis have been persuaded to work with television, at least in part because of the creative freedom they are allowed. As Lee Rich, co-founder of Lorimar noted, "The TV people promise them freedom, and nobody says a word to them about a script. They just let them do their thing. People like David Lynch and John Sayles love that."[98]

Regardless of the position one takes in this debate over creativity, it does not seem as though the majority plan will maximize the number of options for independent producers. By allowing the networks to acquire active syndication capability only for in-house programming, the Report and Order creates an economic incentive for the networks to choose that alternative. This is not to suggest that networks will coerce producers into making in-house deals or that such deals are "bad" for producers. It is simply that the new rules will distort the market and encourage the networks to channel investments in backend rights toward in-house arrangements (up to the permitted limit). Yet this is precisely what some independent producers said they wanted to avoid.[99] They do not want to become network employees. But by requiring that the network own 100 percent of the copyright for "solely produced" programs, producers will be reduced to just that — work for hire employees.

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[95] *Comments of CBS, Inc.*, June 14, 1990 (Appendix A, Affidavit of Jeffrey F. Sagansky).

[96] *Id.*

[97] *Id.* at 19-22; *Further Reply Comments of Capital Cities/ABC, Inc.*, December 21, 1990 at 8 n.16; Testimony of Brandon Stoddard and Jeffrey Sagansky, FCC *En Banc* Hearing, December 14, 1990. The proliferation of viewing options and decline of network audience share "has forced the networks to be more receptive to new talent and seek new approaches to programming." Rohter, *Top Film Makers Finding Freedom in TV*, NEW YORK TIMES, September 20, 1990 at C13.

[98] Rohter, *Top Film Makers Finding Freedom in TV*, NEW YORK TIMES, September 20, 1990 at C13.

[99] *See* Testimony of Steven J. Cannell, FCC *En Banc* Hearing, December 14, 1990 ("I think that the fact that we have, right now, spirited disagreements about programming [is] based on the fact that they do not own my contract, that I do not work for them, I do not have to park in the garage where they say. . . . And I am really concerned about the idea of too many people working in the network production company."). *See also Further Reply Comments of Capital Cities/ABC*, December 21, 1990 at 11 n.24; Testimony of Thomas Carter, FCC *En Banc* Hearing, December 14, 1990.

It is true that the in-house definition has been expanded to include co-productions (when initiated by the producer, subject to a 30-day cooling off period). To an extent this may resolve producers' concerns about becoming network employees. But this leaves me with another question: Why is the Commission limiting this alternative to less than half the prime time entertainment schedule? To the extent the safeguards can prevent even the theoretical possibility of extraction of rights, why should the Commission intervene in the types of contractual arrangements that networks and producers may enter? If, as I suspect, the two-step negotiation process will impede the networks' ability to invest in programming in the remaining 60 percent of the schedule, then the rules will simply keep most of prime time as a preserve for the major studios. The regulatory structure is itself creative, but I do not think it will do much for the programming.

Diversity of Programming Sources

Another indicator of programming diversity — one that is not so elusive as the concept of creativity — is the number of producers who provide programs to the networks. Proponents of the finsyn rules claim that the rules have served their purpose because the number of producers has increased since 1970. The Coalition to Preserve the Financial Interest and Syndication Rule asserted that independent sources of programming multiplied after the rules were adopted, and that there were more than 100 suppliers of prime time programming for the 1987-88 broadcast season.[100]

The networks, however, tell a far different story. They provided evidence that the number of prime time program suppliers dropped by 40 percent, from 55 entities in the 1969-70 season to 33 in the 1988-89 season. Eight firms (primarily MPAA studios) supplied 65 percent of prime time entertainment series in 1988-89, compared to 49 percent in 1969-70.[101] By the fall of 1990, the major studios' share of prime time programming had reached 72 percent.[102] Quite naturally, the studios dispute these figures, and argue that the number of independent producers "actually selling" programs to the networks increased by 200 percent since 1970, from 61 to 123. However, a review of copyright records revealed that generally the major studio — and not the affiliated "independent" producer — had ownership of the program as well

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[100] *Comments of the Coalition to Preserve the Financial Interest and Syndication Rule*, June 14, 1990 (Appendix M).

[101] *Joint Network Comments*, June 14, 1990 (Crandall Volume, Appendix E).

[102] *Reply Comments of NBC, Inc.*, August 1, 1990 at 21; *Comments of CBS, Inc.*, June 14, 1990 at 29; *Joint Network Comments*, June 14, 1990 at 128.

as contractual responsibility for dealing with the networks.[103] By this measure, the major studios control the overriding majority of prime time programming.[104]

Given the trend toward increasing concentration of network program suppliers, it is clear that the finsyn rules did not increase diversity. Consequently, there is no justification for the Commission to preserve a regulatory subsidy for Hollywood on the theory that the rules will do so.

The Commission Should Not Limit Network Syndication Activities

The second major category of safeguards adopted by the majority relates to the syndication market. If networks are free to distribute directly off-network and first run syndicated programs, according to the majority, they will favor their affiliates and otherwise dominate the market for programming. In order to curb potential abuse, the Report and Order prohibits networks from distributing (1) in-house productions aired on another network; (2) programming licensed from outside producers; and (3) first run programming. In addition, the Report and Order prohibits affiliate favoritism and establishes a rebuttable presumption that such favoritism has occurred if a network sells a program to its affiliates in more than 30 percent of the markets in which the show is cleared. The new rules further impose elaborate semi-annual reporting requirements on the networks' program acquisition and syndication activities.

I have long been concerned with issues involving the syndication market, particularly as they relate to independent television stations. For that reason, I advocated safeguards to protect against the theoretical possibility of affiliate favoritism by the networks. I use the term "theoretical" advisedly, since the Commission lacked evidence of affiliate favoritism even in 1970, when "off-network programs constitute[d] a principal staple of the nonnetwork program market."[105] But certain parties argued strongly and sincerely that they feared network favoritism, and

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[103] *Network Reply Comments*, August 1, 1990 (Joint Economic Appendix, Appendix C); *Reply Comments of NBC, Inc.*, August 1, 1990 at 21-23. The Coalition apparently was counting any person that had a production credit on a network program. Actual ownership and control appears to be a more realistic measure.

[104] Independent producers do not seem to have flourished under the rules. NBC submitted that it received prime time programming from 3 independent producers in 1990, down from 9 in 1979; CBS noted that it purchased programming from 22 independent producers in 1970, but only 9 in the 1981-82 season. Of the 22 independent suppliers in 1970, CBS reported that six merged with or were acquired by a major studio and 14 became "inactive." At most, only two of the 22 independent producers are still both independent and active. Of the 9 independent producers providing programming to CBS in 1981-82, four were acquired by major studios and one was acquired by a foreign interest. *Comments of CBS, Inc.*, June 14, 1990 at 29-30.

[105] *1970 Report & Order*, 23 F.C.C. 2d at 389. As the Commission noted in the *1970 Reconsideration Order*, "this rule will remove the *possibility* of the networks taking advantage in syndication distribution of their existing relationships with their affiliates. As stated earlier, *there is no evidence that the latter has been the case*. But the rule will eliminate the *potential* for competitive restraint in these areas." 25 F.C.C.2d at 331 (emphasis added). Of course, there has been no opportunity to test the favoritism hypothesis in the 21 years since the rules were adopted.

I thought it best to adopt protective regulations during the transition to a post-rule environment. The Report and Order, however, goes far beyond any legitimate concern about favoritism. By imposing reporting conditions *and* anti-favoritism rules *and* passive syndication requirements, the majority creates layers of redundant and burdensome regulations that most likely will prevent networks from getting into the business.

I can think of no public policy justification for anti-favoritism requirements *and* a rule that domestic syndication (of most non-in-house programming) be handled by a separate entity. To the extent distribution actually is insulated from the network, what is the point of prohibiting favoritism? And why would the Commission presume anticompetitive activities if 30 percent or more of the network's affiliates end up buying a program in which the network owns an interest if the network lacks distribution power? It simply makes no sense and will involve the Commission in endless amounts of record-keeping and dispute resolution.

Finally, other than a possible desire to keep networks out of syndication altogether, I can discern no rational pattern to the majority's cut on which programs can be syndicated directly and which cannot. Under the Report and Order, a network may syndicate directly (1) in-house programming presented on the network in prime time (subject to the 40 percent limit); (2) all non-entertainment programming; and (3) all non-prime time programming. Everything else must be syndicated through a third party. I should point out that the passivity requirement is no small penalty — it deprives the network of a substantial percentage of the syndication revenues.[106] Also, to the extent the restrictions prohibit a network from building up inventory, it could prevent the formation of the "critical mass" needed to create a syndication business. Additionally, the definition of "in-house" programming for purposes of engaging in first run syndication is far more restrictive than the definition of in-house network programming.[107]

While the Report and Order purports to promote competition in syndication, it serves only to limit the number of competitors in an increasingly concentrated market. It should be kept in mind that television program syndicators primarily are vertically-integrated companies that are involved in various aspects of the communications business. Of the top ten first run syndication companies, five are MPAA studios and three others include the Tribune Company, Multimedia and King World.[108] These entities do not need government protection. Moreover, the market share of these firms has been increasing. For example, the MPAA-syndicators' share of the off-

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[106]"As a general rule, a domestic syndicator keeps about 30-35% of the gross U.S. syndication revenues, plus all distribution expenses, from the product it controls." *Further Comments of CBS, Inc.*, November 21, 1990 (Appendix C, Affidavit of William B. Klein).

[107]The majority would permit network first run involvement only for programs that are "solely produced" by a network. Foreign and domestic co-productions would not be permitted.

[108]*Comments of NBC, Inc.*, November 21, 1990 at 44; Crandall, *The Economic Case Against the FCC's Television Network Financial Interest and Syndication Rules* (submitted with Joint Network Comments, June 14, 1990) at Appendix A.

network syndication market has grown from 31.5 percent in 1971 to 58.5 percent in 1989.[109] Despite this expansion of concentration, the majority would prevent active syndication for most of its programs any entity that has 15 hours of prime time programming that is distributed to 75 percent of U.S. television households. Yet, syndicators such as Paramount distribute 20 hours per week and Disney's Buena Vista company distributes 17.5 hours per week.[110] Moreover, their method of distribution is functionally equivalent of that used by entities the majority would define as "networks."[111] Given these facts, I do not understand how singling out the networks for unfavorable treatment serves to make the market less concentrated.[112]

Indeed, the behavior of current syndicators suggests to me that the market would benefit from having a larger number of competitors. For example, Paramount Domestic Television, which distributes the *Arsenio Hall Show*, imposes a substantial liquidated damages penalty for any station that fails to broadcast the program at the time specified in the contract. Buena Vista Television has contract provisions that prohibit a broadcast station from exhibiting non-Disney animated children's programs adjacent to Disney-produced shows, and which prevent head to head competition between Disney shows on different TV stations in the same market.[113] Any of these provisions would be illegal if a network attempted to impose them on its affiliates.[114]

Finally, when taken as a whole, the limitations of the Report and Order do not limit syndication activities in any consistent way. If a network developed another *Oprah Winfrey Show*, for example, there would be absolutely no limit on a network's ability to run the program as part of its daytime schedule and then syndicate it. On the other hand, if the network developed the show at its owned and operated stations and wanted to introduce it in first run syndication, the rules bar direct syndication. By the same token, an in-house program that is aired on a network may be syndicated

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[109] *Comments of NBC, Inc.*, November 21, 1990 at 42.

[110] *See Comments of Fox Broadcasting Co.*, March 25, 1991 at 11-12.

[111] *Further Comments of Pappas Telecasting Companies*, November 21, 1990 at 9-10 ("[V]irtually all programming is distributed to stations via satellite. The national networks provide direct, continuous, and simultaneous satellite delivery 'feeds' to their owned and affiliated stations of programming to be exhibited that day by the time specified by the networks. Syndicated programming is distributed via satellite on a so-called 'day-and-date' basis, *i.e.*, the simultaneous distribution of the same program episode to all broadcast stations that have acquired rights to exhibit the program, for exhibition during a specified day and day-part that is acceptable to the syndicator.").

[112] Nor does the fact that networks generally own stations in major markets necessarily set them apart. Tribune Broadcasting Company, for example, owns television stations in New York, Chicago, Los Angeles, Denver, New Orleans and Atlanta and has an active syndication arm. Group W, which also syndicates programming, owns stations in Boston, Philadelphia, San Francisco, Pittsburgh and Baltimore. TELEVISION & CABLE FACTBOOK (Stations Volume, 1990) at A-1378, 1384.

[113] *Id.* at 4-5.

[114] *See* 47 C.F.R. § 73.658 (1990).

directly, while an in-house program aired on a competitive network may not be.[115] What possible rationale can support these distinctions, other than protecting established syndicators from competition?

The Commission Should Not Limit In-House Production

As previously noted, the record in this proceeding does not support retention of the current rules, much less impose significant new regulations. Yet the Report and Order limits in-house productions to 40 percent of a network's prime time entertainment schedule.[116] But other than the studios' understandable desire to limit competition, absolutely nothing in the comments filed suggests any danger to the public interest by allowing the networks to make their own programs.[117] As the Justice Department pointed out, the in-house limitation "is not directed to any potential abuse by the networks."[118]

In fact, this has been one of the few areas where the networks already have had some latitude. The Commission's rules never limited in-house production. And the now-expired consent decree limits were not predicated on any continuing concern regarding network behavior in this area.[119] As the Department of Justice emphasized in this proceeding, the consent decree limits "were intended to be temporary limitations on the activities of the networks, and there has been no showing in this proceeding that these limits should be extended by Commission regulation."[120]

The networks' ability to engage in limited amounts of in-house production under the former consent decree limits proved neither to affect the choices of programs run in

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[115]For example, Fox produces *LA Law* for NBC. If Fox were to become a network or the three established networks began producing programs for one another, the new rules would prevent programs in this category to be syndicated directly by their network producers. As Fox noted in its comments, "[t]here is absolutely no economic or policy basis for a prohibition on [producing for other networks] which, in effect, *reduces* the number of studios producing programs for the networks." *Comments of Fox Broadcasting Co.*, March 25, 1991 at 10 n.13 (emphasis in original).

[116]It is unclear how this production cap will operate in practice. Each network's prime time schedule is composed of a mix of entertainment, sports and news programming. The amount of in house production permissible under the rules presumably will shift as a network alters the make-up of its schedule, which could occur weekly. Moreover, it is uncertain how the Commission will classify certain reality-based programs, such as *Top Cops* or *America's Most Wanted*, that may be considered either news or entertainment.

[117]*See Further Reply Comments of the Coalition to Preserve the Financial Interest and Syndication Rule*, December 21, 1990 at 8. As these comments make clear, an in-house limit is not based on any actual abuse by the networks, but on "the *threat* of unlimited in-house production." *Id.* (emphasis in original).

[118]*Further Comments of the United States Department of Justice*, (filed March 25, 1991) at 3.

[119]Under the consent decrees, the networks were permitted to produce unlimited amounts of in-house programming after November 1990.

[120]*Further Comments of the United States Department of Justice*, December 21, 1990 at 12.

prime time or the renewal of series to enhance future syndication value. Before the in-house limits expired in 1990, none of the three networks produced the four hours per week permitted by the decrees. Indeed, network programming executives routinely reject in-house series proposals because of the need to develop a strong schedule. As NBC's President and CEO said in a 1988 speech before the Hollywood Radio and Television Society, "We went outside for every new series we needed, because in the judgment of Brandon [Tartikoff] and his people, the shows we licensed had more potential than the shows we produced. . . . Putting on weaker programs simply because we happen to produce them would be the way to bankruptcy."[121] With respect to renewal of in-house programming, NBC's President pointed out that since the 1950s, when NBC Productions was created, "only three prime time series that it has produced have reached syndication: *Bonanza*, *Little House on the Prairie* and *Punky Brewster*, two of which had horses in them."[122] There is simply no evidence in this record to suggest that any of the networks favor in-house productions over programs created by outside producers.[123]

I can imagine no public interest justification for imposing limits on network production of in-house programming. Neither can the Justice Department, as it made clear on the record:

> Regulations imposing limitations on how much any firm can produce internally are extreme, and, unless fully justified by competitive considerations, are inherently anticompetitive. They should not be imposed without strong theoretical and evidentiary support for the conclusion that anticompetitive effects are quite likely in their absence. As our previous comments have shown, that support is wholly lacking. The changes in the television marketplace since the FISR were imposed, notably the explosive growth of cable television and the emergence of a fourth broadcast network, point strongly in the direction of removing existing regulations, not imposing new ones.

Further Comments of the United States Department of Justice, December 21, 1990 at 12.

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[121] *Wright Goes Back to the Programing Drawing Board*, BROADCASTING, April 18, 1988. *See Comments of NBC, Inc.*, November 21, 1990 at 35.

[122] BROADCASTING, April 18, 1988.

[123] *See* Kissinger, *No (In)House Party For Homegrown Shows*, VARIETY, May 13, 1991 at 47, 50 (ABC pulled the *My Life and Times* from its schedule after only two shows. NBC moved *Shannon's Deal* to five different nights, put the program on extended hiatus and finally cancelled it. NBC cancelled other in-house shows, such as *Family For Joe*, *Hardball*, *Mancuso F.B.I.*, *Generations*, *The Guys Next Door* and *Gravesdale High*. CBS cancelled *Bagdad Cafe*, but has retained those in-house shows that have fared well in the ratings, such as *Evening Shade* and *Rescue 911*.). *See* Carmody, *The TV Column*, WASHINGTON POST, May 21, 1991 at C6.

The New Network Definition Will Not Encourage Competition

By retaining an hours-based network definition, the majority undermines the Commission's longstanding goal of encouraging network competition. To be sure, the Commission chose such a standard when it adopted the finsyn rules in 1970. But as noted in the reconsideration order:

> Encouragement of the development of additional networks to supplement or compete with existing networks is a desirable objective and has long been the policy of the Commission. Hence we have redefined the term "network". . . to apply only to major national television networks. This will remove any doubt that our actions are intended to encourage the competitive development of additional networks as well as other alternate program sources.[124]

At that time, the reasons for imposing a 15-hour standard "were not discussed" in the rulemaking "and are unclear as a result."[125] What was clear, however, was that the rules were "written only with the goal of changing the behavior of those already identified as engaged in the practice to be corrected." In other words, because of the "desire to encourage the development of additional networks," the "scope of the . . . rules [was] limited to the existing national networks."[126]

I think it is fair to say that then, as now, the 15-hour standard was plucked out of the air. There is no reasoning that ties the number of hours programmed to the types of network practices that led to the adoption of the rules. In 1970 such arbitrary decisionmaking could be excused. The emergence of additional national networks was not viewed as imminent. But the Commission's experience in the intervening years has demonstrated that the hours-based definition "may well function, in practice, to curtail the very activities the rule was intended to encourage."[127] Consequently, the Commission has been forced to waive the definition when it threatened to snuff out fledgling networks.[128] By now, we should know better.

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[124] *1970 Reconsideration Order*, 25 F.C.C.2d at 333.

[125] *Christian Broadcasting Network, Inc.*, 87 F.C.C.2d 1076, 1077 (1983).

[126] Network Inquiry Special Staff, NEW TELEVISION NETWORKS: ENTRY, JURISDICTION, OWNERSHIP AND REGULATION (Vol. 1, 1980) at 458, 462. As I make clear elsewhere, I believe the time has come to phase out the finsyn rules, so the reasons for the original definition are, for my purposes, academic.

[127] *Christian Broadcasting Network, Inc.*, 87 F.C.C.2d at 1078.

[128] *Fox Broadcasting Company*, 5 FCC Rcd. 3211 (1990); *Home Shopping Network, Inc.*, 4 FCC Rcd. 2422 (1989); *Christian Broadcasting Network, Inc.*, 87 F.C.C.2d at 1078.

Nevertheless, the majority sets a standard of 15 prime time hours for the network definition, a rule that will serve as a *de facto* limit on those entities striving to develop new competition. Fox has indicated that sound business judgment will force it to "dive under" whatever hours-based limit the Commission sets, and I cannot blame it. Thus, an hours based definition not only ill-serves the public interest, it is easily evaded. As one observer pointed out, the Commission's new network definition "means the Fox network . . . could air 14 hours and 59 minutes a week of prime time programming, plus unlimited amounts of daytime and Saturday-morning fare, and still remain merrily regulation free."[129] There are other ways to avoid the definition, as well. For example, an emerging entity could transmit 14-plus hours of "network" prime time programming and distribute the balance of its programs as first run syndication. I am certain that the creative minds at the networks and studios can fashion many ways around an hours-based definition.

To the extent the Commission intends to impose some residual or transitional finsyn rules, it is incumbent upon us to develop a new network definition. This was true under either the majority or minority approaches. I had hoped that we could devise some definition that measured market power or at least market presence. Unfortunately, there was insufficient interest in creating such a measure. I only hope that it does not take the loss of a fledgling network to teach the Commission a lesson.

The New Rules Violate the First Amendment

When the majority acts to foster greater business opportunities for Hollywood producers at the expense of the networks, it runs headlong into the bedrock principle that "restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). The Report and Order assumes that the speech of studios or of independent producers is more worthy of protection than that of the networks even though "speech does not lose its protection because of the corporate identity of the speaker." *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 16 (1986). *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978). But the First Amendment cannot be reconciled with the majority's premise that the government may set aside a portion of the facilities of a corporate speaker in order to propagate a range of views deemed to be socially desirable. *See, e.g., Pacific Gas & Electric Co.*, 475 U.S. at 20; *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 544 (1980).

Perhaps we should be reminded periodically that the President appointed us to be FCC Commissioners, not philosopher kings. The Commission has no overriding mandate to improve American culture through enforced "diversity" of media voices, nor would the Constitution permit such a mission. Contrary to the assertions of pro-Hollywood commenters in this proceeding, the First Amendment does not empower the government affirmatively to compel diverse speech. The source of this confusion

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[129] Shales, *The FCC and the Threat to Free TV*, WASHINGTON POST, April 8, 1991 at C2.

appears to be some language in *Associated Press v. United States*, in which the Supreme Court stated:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[130]

Although this little bit of dictum has become quite well known through repetition, it stands only for the unremarkable proposition that the First Amendment does not immunize the press from Sherman Act prosecutions. It does not support the majority's assumption that the First Amendment empowers bureaucrats to pick winners and losers in the marketplace to serve some hazy notions of diversity. Yet the Report and Order uncritically accepts *Associated Press* as its primary source of constitutional support, referring to the facts in that case as "a similar situation" as that presented here. Report and Order ¶ 71.

It should be remembered, however, that *Associated Press* had to do with the threatened monopolization of news wire services. Here, however, the only threat to dissemination of news to the public comes from the continuing regulation of the networks. Nothing in *Associated Press* suggests that it would support restrictions on networks' editorial discretion in order to promote diverse and antagonistic sitcoms, as the majority suggests. If anything, in its decisions since *Associated Press*, the Court has made clear that the government lacks such a mandate.

For example, in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), the government brought Sherman Act charges against major Hollywood studios, including Paramount, Warner Brothers Pictures, Twentieth Century-Fox Film Corp., Columbia Pictures Corp., Universal Corp. and United Artists Corp. The government charged that the studios had conspired to restrain trade in the interstate exhibition of motion pictures by price fixing, pooling agreements, formula deals, block booking and discrimination against small independent exhibitors. The government further suggested that the studios' practices gave it a First Amendment claim, independent of the antitrust allegations. But the Court rejected such a reading of the First Amendment. Like the majority's focus on the prime time entertainment market in this proceeding, the *Paramount Pictures* Court noted that the government's case pinpointed the narrow category of first run theatres, "the cream of the exhibition business." It found that the case "has important aspects under the Sherman Act," but "it bears only remotely, if at all, on any question of freedom of the press." 334

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[130] 326 U.S. 1, 20 (1945).

U.S. at 167. That is, the government had no First Amendment mandate to promote diversity, but had to content itself with enforcing the antitrust laws.[131]

If there is anything that is clear from this proceeding, it is that it does not involve any antitrust issues.[132] There has been no Sherman Act claim. This record contains no evidence that the networks have perpetrated an antitrust violation and the majority makes no such finding.[133] Even if it did, the Commission is not empowered to enforce the antitrust laws. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978); *NBC v. United States*, 319 U.S. 190, 223-24 (1943). Finally, to whatever extent antitrust remedies and their constitutionality are relevant, the networks have already paid their debt to society. The in-house limits at issue have expired; the agency responsible for enforcement has informed this Commission that the restrictions "were intended to be temporary limitations on the activities of the networks, and there has been no showing in this proceeding that these limits should be extended by Commission regulation." *Further Comments of the United States Department of Justice*, December 21, 1990 at 12.

Thus, there is no "antitrust/diversity" justification for the restrictions in the Report and Order. And traditional justifications for broadcast regulation are equally unavailing.

To be sure, broadcasters historically have received more limited First Amendment protection than traditional speakers. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). But this fact does not give the Commission carte blanche to intervene in the marketplace in an open-ended and speculative quest to enhance diversity.[134] Although the Supreme Court has observed that "[e]ach method

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[131]The Supreme Court also has made clear that the Commission has no affirmative First Amendment power to dictate licensees' entertainment programming in order to protect the diversity of program formats. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 (1981). Referring to *Red Lion*, the Court noted that "we did not imply that the First Amendment grants individual listeners the right to have the Commission review the abandonment of their favorite entertainment programs." *Id.*

[132]Consequently, prior cases involving the network consent decrees cannot be read as approving an in-house production limitation imposed as part of a rulemaking. The district court in *United States v. NBC* merely upheld the textbook-law proposition that "the First Amendment does not shield NBC nor any other television network from the proscriptions of the Sherman Act." 449 F. Supp. 1127, 1140 (C.D. Cal. 1978). There is no Sherman Act claim here.

[133]Indeed, apparently realizing that it could not make a case on antitrust grounds, the majority goes to some lengths to acknowledge that the networks "may not possess monopsony power in an antitrust sense" and "the instant case may not involve a Sherman Act violation." Report and Order ¶¶ 37, 71. *See also* ¶ 47 ("diversity in programs and program sources" is based on a "broader public interest mandate" than mere "antitrust principles").

[134]The Supreme Court's decision in *Metro Broadcasting v. FCC*, 110 S. Ct. 2997 (1990) is not to the contrary. In that case, the Court upheld the Commission's minority preference policies in which the racial identity of an applicant is one of a number of non-decisive factors to be considered in awarding broadcast licenses. *Id.* at 3026 & n.50. It also upheld the Commission's distress sale policies, which have been applied to "a tiny fraction — less than four-tenths of one percent — of all broadcast sales since 1979." *Id.*

[of communication] tends to present its own peculiar problems.," it has stressed that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

A broadcaster's public trustee obligations notwithstanding, freedom of expression is the rule for Commission licensees since "the 'public interest' standard necessarily invites reference to First Amendment principles." *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 659 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990). Broadcasters, after all, "are engaged in a vital and independent form of communicative activity." *FCC v. League of Women Voters of California*, 468 U.S. 364, 378 (1984). "As a result, the First Amendment must inform and give shape to the manner in which Congress exercises its regulatory power in this area." *Id.* Although the scarcity rationale for broadcast regulation has resulted in "some adjustment in First Amendment analysis," *id.* at 377, decisions of the Supreme Court and of lower courts consistently make clear that any limitations on broadcasters' rights "ha[ve] been construed narrowly." *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1111 n.21 (D.C. Cir. 1978) (*en banc*).[135] Consequently, any

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at 3027. Even with such an extremely limited (and expressly structural) intrusion, a sharply divided Court upheld the Commission only because the "policies bear the imprimatur of longstanding congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity." *Id.* at 3027-28. But the Court's majority emphasized that preferential policies are limited in extent and duration "subject to reassessment and reevaluation by the Congress prior to any extension or reenactment" based on annual reports from the Commission, and that "there will be no need for further minority preferences once sufficient diversity has been achieved." *Id.* at 3024-25. Where the Court acknowledged that "the growth of traditional broadcast facilities" and "the development of new electronic information technologies" had rendered certain other diversity-enhancing policies unnecessary, the Commission had made no such finding with respect to minority ownership. *Id.* at 3022 n.41.

The limited holding of *Metro Broadcasting* is strikingly inapplicable to the finsyn rules, which will directly limit the programming choices of whole segments of the broadcasting industry. Moreover, unlike the minority preference policies, the new finsyn rules are not a product of longstanding congressional policy and are not subject to annual review. Nor can there be a finding that the changes in the broadcast and video marketplace have not undermined the rules' rationale. With respect to regulations, like finsyn, that affect programming, the Court in *Metro Broadcasting* made clear that any FCC policy that "denied a broadcaster the ability to 'carry a particular program or to publish its own views,'" would raise "'serious First Amendment issues.'" *Id.* at 3019 n.36 quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 396 (969). The Court also stressed that it "would not 'hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity' to equal protection principles." *Metro Broadcasting, Inc.*, 110 S. Ct. at 3011 quoting *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 103 (1973).

[135]*Compare, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (broadcasters may be required to provide balanced presentations of controversial issues), with *CBS, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973) (broadcasters may not be compelled to provide a generalized right of access to discuss controversial issues); *CBS, Inc. v. FCC*, 453 U.S. 367 (1981) (First Amendment permits a "limited right of 'reasonable' access that pertains only to legally qualified federal candidates [that] may be invoked by them only for the purpose of advancing their candidacies") with *Johnson v. FCC*, 829 F.2d 157 (D.C. Cir. 1987) (candidates do not have a right of access to televised debates); *FCC v.*

restrictions on the selection of programs by the networks must be "narrowly tailored to further a substantial governmental interest." *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 812 (D.C. Cir. 1988); *FCC v. League of Women Voters of California*, 468 U.S. at 380. Under this standard, "the Government [has] the burden of justifying any practice which restricts free decisionmaking" affecting "the content *or selection* of programs to be broadcast." *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1110 (emphasis added).[136]

Under the narrow constitutional leeway accorded the government in matters affecting broadcasting, courts never determined that the finsyn rules are consistent with the First Amendment.[137] Even if the finsyn rules had received constitutional scrutiny when they were adopted, it must be remembered that such review would have been relevant to the media environment of 1970. But the constitutionality of broadcast regulation is not an immutable fact; it is based on "'the present state of commercially acceptable technology' as of 1969." *News America Publishing, Inc.*, 844 F.2d at 811, quoting *Red Lion*, 395 U.S. at 389-90. *Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987). The Supreme Court has reminded us that "because the broadcast industry is dynamic in terms of technological change[,] solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *CBS, Inc. v. Democratic National Committee*, 412 U.S. at 102. Thus, the constitutionality of any reaffirmation of the finsyn rules depends on

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National Citizens' Committee for Broadcasting, 436 U.S. 775 (1978) (First Amendment allows newspaper-broadcast cross-ownership restriction) with *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988) (discriminatory application of newspaper-broadcast cross-ownership restriction is unconstitutional). *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) ("It is appropriate, in conclusion, to emphasize the narrowness of our holding."); *Bolger v. Youngs Drug Products, Corp.*, 463 U.S. 60, 74 (1983); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d at 1453 ("Even for broadcasters, regulations that transfer control over programming content to others have met with approval only grudgingly and then only in highly specialized circumstances and without reference to the *O'Brien* balancing formulation.")

[136]The government's burden is particularly daunting where, as here, the restrictions on network speech are content-based. See *FCC v. League of Women Voters of California*, 468 U.S. at 383-84 (ban on editorials by noncommercial licensees invalidated); *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1111-12 (statute requiring that programs related to issues of public importance be recorded "on its face is *not* content neutral."). Content-based restrictions "must be strictly scrutinized," 593 F.2d at 1110 n.17, and a rule "that denies one group of persons the right to address a selected audience . . . is plainly such a regulation." *FCC v. League of Women Voters of California*, 468 U.S. at 384 quoting *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. at 546 (Stevens, J., concurring). The majority's rules impose a direct limit on the networks' ability to produce prime time entertainment programming. As the Commission acknowledged when it adopted the finsyn rules, "control [of] the production" of syndicated programming equates to control of "the form and content." 1970 Report and Order, 23 F.C.C.2d at 389.

[137]The financial interest and syndication rules have never before been subjected to First Amendment scrutiny. Previous decisions focused only on the constitutionality of the Prime Time Access Rule, which has a far less extensive effect on network speech. *See Mt. Mansfield Television, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); *National Association of Independent Television Producers & Distributors v. FCC*, 516 F.2d 526 (2d Cir. 1975). Yet even if the finsyn rules had been upheld pursuant to the First Amendment, it would be of little help to the majority's plan. The new rules impose restrictions on in-house production and create economic penalties for taking financial interests that had never been contemplated under the former regulations.

whether the underlying premise of the scarcity rationale is still valid,[138] and whether the networks dominate the television programming market to the extent that there is a governmental interest sufficient to overcome their First Amendment rights.[139]

If the current record makes one thing clear, it is that the constitutional balance has shifted over the past two decades. In 1971, the United States Court of Appeals for the Second Circuit described the Prime Time Access Rule as "a very real restraint" on licensees' choice of programming, but concluded that the restriction could be justified by the goal of enhancing diversity.[140] The court struck this balance, however, on the assumption that "only three organizations control access to the crucial prime time evening television schedule" and that the networks "determine in large measure what the American people may see and hear." *Mt. Mansfield Television, Inc.*, 442 F.2d at 474, 477. The court specifically premised its holding on the assumption that there were no realistic alternatives to network programming. It noted, for example, that "[i]ndependent stations are not adequate by themselves, in light of the fact that only fourteen of these [top 50] markets have one or more independent VHF stations." *Id.* at 483. The court also focused on contemporary business practices, such as "the increase in 'spot' advertising by many sponsors and the concomitant decrease in programs sponsored entirely by one or two advertisers." *Id.* at 482. It saw this trend as consolidating "network control of the creative process" and noted that the Commission predicted — incorrectly, as we now know — that "the trend toward multi-sponsored programs can be reversed." *Id.* at 482-83. Of course, cable television networks, VCRs and other new technologies are not mentioned in the decision because they did not exist in 1971.

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[138]Fortunately, we do not need to resolve this issue in this proceeding. It is important to note, however, that the Commission has concluded that "there is no longer a scarcity in the number of broadcast outlets." *Syracuse Peace Council*, 2 FCC Rcd. 5043, ¶ 75 (1987), *aff'd on narrower grounds sub nom. Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 717 (1990). *See also* Statement of then-General Counsel Diane Killory, Open Meeting, August 4, 1987 ("We agree that it is time to revisit and revise [the First Amendment standard for broadcasting]; and [we] urge[] the Supreme Court to do so."). Moreover, both the courts and commentators have questioned the continuing validity of the scarcity rationale for the constitutionality of regulating broadcast content. *E.g., FCC v. League of Women Voters of California*, 468 U.S. at 376-77 n.11; *News America Publishing, Inc.*, 844 F.2d at 811 ("The Supreme Court . . . has recognized that technology may render the [scarcity] doctrine obsolete — indeed, may have already done so."); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 506-09 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987); *Loveday v. FCC*, 707 F.2d 1443, 1459 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1008 (1984). *See* L. Tribe, AMERICAN CONSTITUTIONAL LAW 1005-06 (2d ed. 1988) ("reconsideration [of the scarcity argument for broadcast regulation] seems long overdue").

[139]Irrespective of these two issues, there also is the question of whether the means chosen by the majority demonstrably advances the First Amendment goal of diverse programming. The Supreme Court has made clear that the Commission's experience with a given rule will determine its ongoing constitutionality. *Red Lion*, 395 U.S. at 393; *FCC v. League of Women Voters of California*, 468 U.S. at 378-78 n.12. As noted earlier, the Commission's experience with the finsyn rules does not show that this regulatory intrusion has contributed significantly to diversity.

[140]*Mt. Mansfield Television, Inc.* , 442 F.2d at 477-78. As noted previously, the court did not address the First Amendment status of the finsyn rules. But the decision reveals the constitutional assumptions that would have been part of any such analysis.

In short, all of the key assumptions about the programming market that were central to the 1970 Report and Order, and that are essential to sustaining its constitutionality, have changed completely. If the Commission in 1991 set out to adopt finsyn rules for the first time, I find it inconceivable that anyone would consider doing so. Yet the Commission is constitutionally obligated to justify retaining any portion of the finsyn rules, and, in doing so, account for changing technology.[141] This, the majority has not done. Indeed, it cannot do so given the record in this proceeding and the reality of the current television marketplace.

The Report & Order in this proceeding is a striking demonstration of the majority's inability to justify the continuing finsyn rules. Other than repeated references to the 1970 decision and its rationale, the Report & Order contains no evidence to suggest current or future network practices will materially affect viewer choices. The best the majority can do is to repeat that program producers are not "immune from network extraction of ownership interests," that there is a "theoretical possibility" a network could produce all of its programming in-house, that network syndicators "could exploit" their market structure, and that affiliate favoritism is "a real possibility." Report and Order ¶¶ 47, 68, 95, 100. In other words, the Report and Order's operative standard for imposing governmental restrictions is, "it could happen." But the constitution requires more than this. As courts have made clear, "the mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms." *Quincy Cable TV, Inc.*, 768 F.2d at 1454. The Commission "must do something more than merely posit the existence of the disease sought to be cured." *Id.* at 1455.[142]

Despite the absence of record support, the majority has gone beyond merely keeping some significant finsyn limits. The new rules impose intrusive new burdens on the networks. The 40 percent in-house production limit directly restricts the networks' ability to engage in speech over their own facilities. Moreover, because it is content based, the rule creates a perverse incentive for networks to run more entertainment programming in prime time and less news and public affairs programming. With respect to the prime time schedule, the majority plan gives

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[141]Some have suggested that the present rules enjoy a presumption of validity. With respect to their First Amendment impact, however, such a presumption is invalid. *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1110.

[142]The majority notes that the record contains "alternative views of the television programming world so starkly and fundamentally at odds with each other that they virtually defy reconciliation" but asserts that our own "understanding of the programming world" plus "our own experience and expertise" have led to formulation of the new rules. Report and Order ¶ 11. See also ¶ 32. With all due respect to the three junior Commissioners, "especially where First Amendment rights are at stake, the Commission must do more than ask [courts] to defer to its 'more or less intuitive model' and 'collective instinct' to sustain its assertion that a rule is both necessary and important." *Quincy Cable TV, Inc.*, 768 F.2d at 1458 (citation omitted). *See also Schneider v. State*, 308 U.S. 147, 161 (1939) ("Mere . . . preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.").

networks the greatest ability to profit from programming produced in-house.[143] But by capping this category at 40 percent of the prime time *entertainment* series, it creates a powerful inducement for networks to expand the size of the universe. Unfortunately, for each hour of the prime time schedule that is devoted to non-entertainment programming, the networks' ability to engage in direct syndication of entertainment shows is reduced by 24 minutes. To the extent the networks already are basing some programming decisions on the cost of prime time programming, I am afraid that the Report and Order will simply encourage networks to avoid news and public affairs programming. There simply is no justification for the Commission to structure the programming market in ways that affect the content of network schedules.

Nor is there support for imposing significant penalties on the networks' ability to get involved in significant areas of programming. To the extent a network wants to engage in the first run syndication market or in program production for another network (both of which would increase the number of program suppliers) it may do so only if it forfeits a third or more of its potential syndication revenues.[144] Penalizing broadcasters for engaging in speech is inconsistent with the First Amendment. A rule that imposes "some financial burden" on licensees clearly is a "First Amendment restraint." *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1114 & n.26. In this case, it is no answer to argue that networks may gain access, if for a price, to markets that previously were denied to them. The government bears the burden of justifying any restraints on speech, and "the First Amendment does not permit us to tolerate even minimal burdens on protected rights where no legitimate government interest is truly being served." *Id.* at 1122.

Taken as a whole, the majority plan simply lacks the precision necessary to pass constitutional muster. The First Amendment will tolerate neither over- nor underinclusive regulations. *FCC v. League of Women Voters of California*, 468 U.S. at 392. Yet the Report and Order safeguards are excessively broad. In particular, the requirement that networks be limited to passive syndication rights is unnecessary where there are anti-favoritism rules. Overinclusiveness also infects the network definition. The Report and Order applies restrictive finsyn rules to any entity that meets its arbitrary trip-wire, regardless of the absence of market power or past abuses. The syndication rules are underinclusive to the extent non-network group owners and syndicators may exert market power and coerce licensees' programming choices. Some of the provisions of the Report and Order are both over- and underinclusive. For example, the 40 percent cap on in-house production is overinclusive because there is no evidence of network abuse in this area. However, to the extent the majority's theories regarding network market power are credible, allowing the networks to produce 40 percent of the prime time entertainment market is underinclusive. In this regard, it is not sufficient to say that the rules address one problem at a time. "[C]ourts reject the facile one-bite-at-a-time explanation for rules

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[143]In-house programs need not be distributed through a third-party syndicator, thus giving the networks a greater profit margin.

[144]*Further Comments of CBS, Inc.*, November 21, 1990 (Appendix C, Affidavit of William B. Klein).

affecting important First Amendment values." *News America Publishing, Inc. v. FCC*, 844 F.2d at 815.

Finally, the Report and Order will not withstand constitutional scrutiny unless the majority can demonstrate that the problems addressed by the rules are real and the solutions effective. The Supreme Court has made clear that the government lacks the authority to "deny . . . broadcasters the right to [engage in speech] on the basis of speculative fears." *FCC v. League of Women Voters of California*, 468 U.S. at 399. Yet in this case, the networks are hobbled because they *might* abuse their in-house production capability and because of the *potential* for affiliate favoritism. The First Amendment requires more from this agency than nebulous and unsubstantiated references to "diversity." Moreover, there is nothing to suggest that the new rules will result in more diversity or creativity. In fact, there are powerful reasons to believe the majority plan will lead to further concentration and a reduction of programming choices. Given such a possibility, courts will not tolerate even minimal burdens on speech.[145]

Conclusion

The record before us is plain. The media marketplace of 1991 bears so little resemblance to the one that existed in 1970 that the perpetuation of financial interest and syndication rules is almost inconceivable. Although for transitional purposes, I would have voted to phase out the rules and impose appropriate safeguards, I cannot support the indefinite continuation of restrictions. To the extent today's Report and Order is deregulatory, I can concur. But I dissent from the overall result, because it imposes a burdensome and unnecessary scheme of regulation that could threaten the future of free television.

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[145] *Community Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1122.

STATEMENT OF
COMMISSIONER SHERRIE P. MARSHALL

Re: The Financial Interest and Syndication Rules

I am a deregulator. The Commission's action today is deregulatory. What it is not, is a blind response to the siren call of total deregulation. What it is, is a major departure from the regulatory schemes of the last twenty years. This is calibrated deregulation -- a balanced deregulatory approach designed to ensure that the American people continue to enjoy the great panoply of diverse and creative programming that is the hallmark of American television.

Some will argue that we should have answered the siren's call. And frankly, that would have been the easiest course to take. On the surface it looks and sounds good. But when you study the prime time television marketplace as I and my colleagues have, you learn that there is much more at stake than what meets the eye.

Let me name some of the forgotten factors in the fin-syn debate. Diversity. Local independent broadcasting. Independent program producers. The next Norman Lear or Marcy Carsey or Quincy Jones. And, above all, the American viewing public.

I can't tell you how many articles I've read over these past months beginning with the clause, "changes in the financial interest and syndication rules will make little visible difference to the American public." Rubbish! Total repeal of the fin-syn rules (Rules) may not be of immediate consequence to American audiences. But they would see its effects. The diverse and antagonistic sources of programming that are a touchstone of our national identity would be gone. And the American people would know it; they might not know why; but they would know. And we would have betrayed our trust, our statutory mandate, by responding to the luring call of total deregulation.

Today, I am pleased to say that the FCC has rejected that call. We have gone past the surface images and conducted a careful review of the complex and multi-layered prime time television marketplace. And out of our protracted review has emerged a plan that will allow the networks significant reentry into the program production and foreign and domestic distribution businesses, while, at the same

time, maintaining several safeguards that, hopefully, will ensure continued diversity in both the sources and outlets of American television programming.

In analyzing the voluminous record before us I have reached two fundamental conclusions. First, the decline of the broadcast networks' once unchallenged supremacy over the television landscape warrants substantial relaxation of our rules. Network television is the only programming service available to virtually all American television households, and provides a unique informational and entertainment service central to our identity as a Nation. Regulatory constraints should not be allowed to undermine the networks' continued viability.

Second, the Commission's statutory mandate requires us to promote the public interest in diverse and antagonistic sources of programming. Our Nation was founded on the principles of free speech and an open marketplace for the free flow of new and diverse ideas. To allow anyone to control access to both the ideas and their distribution is to breach that fundamental concept.

The Commission's decision today represents an enormous deregulatory action that provides the major networks a wide variety of liberties and freedoms they have not enjoyed for the past two decades. As such, it is clearly designed to nurture the continued health and viability of those networks, and the emerging fourth network as well. At the same time, today's decision provides minimal safeguards designed to ensure that our goals of diversity and competition continue to be achieved -- both within the independent television production community and the independent broadcasting industry.

To those who would say this is merely that old-time regulation, I say this plan is as deregulatory as reality permits. We have heeded the lessons of airline and savings and loan deregulations, and have maintained accountability for the networks while still expanding competition in the video production and distribution marketplaces.

To those who would say this is a direct contradiction of the Commission's deregulatory cable policies, I say cable doesn't have a government subsidy through the prior grant and continuing free use of valuable public spectrum. Moreover, the one area of cable television over which this Commission has expressed concern is the potential for anticompetitive program access conduct by conglomerate cable operators and programmers.

To those who would say our plan involves complex behavioral safeguards that intrude on private negotiations and business practices, I say the prophylactic non-rules of phased in repeal may be neater, but they would undermine the very diversity we are sworn to promote.

Others will say that today's rule changes ignore marketplace realities -- that the networks lack significant market power by any recognized standard of antitrust law, yet we're still regulating them. As a deregulator I am inclined to trust market forces, but it is not a cure to inadequate competition to strengthen the hand of the dominant player. Further, as the Commission has long recognized and the Supreme Court has long affirmed, the FCC's mandate is not merely to police antitrust violations.[1] Rather, the Commission's mandate requires it to promote the public interest by ensuring a diversity of programming choices for the American viewer. That's why we're the FCC, not the FTC.

Others may criticize today's rule changes as overly broad. That they protect those who need no protection -- the major studios and established major producers. But as gatekeepers to the national audience, the networks have the power to extract by conditioning access from all producers, large and small.

And the counterargument that cable networks are a viable alternative just doesn't wash: individually, each of the networks still retains a share of the prime time viewing audience greater than that of all cable networks combined. And while cable networks have begun to expand their acquisition of original entertainment programming, the entertainment programming expenditures of each network alone remains at least double those of all cable networks combined.

The same is true of the claim that today's rule changes preclude vertical integration of U.S. companies while cartelizing the U.S. market to the benefit of foreign-owned studios and other foreign competitors. That dog just won't hunt, or, as one wit put it, "the yellow peril is a red herring."

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[1] National Broadcasting Company v. U.S., 319 U.S. 190, 223 (1942).

Today's rule changes allow every bit as much vertical integration and efficiency as we have found our public interest in diversity to permit. Remember, the United States leads the world in television programming production and sales -- with the financial interst and syndication rules unchanged. Under the new rules, U.S. networks will be allowed to participate in foreign distribution without limit, as well as participate in domestic distribution with only minimal safeguards.

Yet, I do not endorse today's substantial deregulation without some trepidation. In fact, I have real reservations about the experimental nature of particular aspects of this plan. For example, the separated negotiation requirement contained in these rules may be a toothless watchdog, and the protections it offers may be insufficient to preserve the very diversity the Commission is pledged to promote.

Recent experience and documented history prior to and after adoption of the Rules demonstrate that without some safeguard the networks will extract financial interest and syndication rights at less than market value as a condition of access to the network schedule. That access does not occur at the time of licensing, or even thirty days thereafter. It occurs at the time of ordering and scheduling of the program in question.

By insisting that the networks certify that any acquisition of rights was not acquired as a condition of network airing, ordering or renewal, we have mitigated, but not fail-safed, the risk that such rights will be extracted as a condition of access to the network schedule. But it may be like having the fox certify that the chickens are safe inside the chicken coop. Think about it. Who's going to challenge the network's certification? The producer who succumbed to the extraction in the first place? The producer who, at this time has no buyers, other than the major broadcast networks, for his wares?

I would have preferred either the "two-step" approach recommended to us by NTIA, or even imposition of a "producer initiated" requirement on the secondary negotiation. The NTIA proposal had the advantage of being tied to industry accepted timetables, but the disadvantage that foreign syndication rights might not be available. And a producer initiated requirement might at least assure the veracity of the subsequent network certification required under the Commission's approved plan.

Either alternative would have been far less experimental than the ones we adopt today, but some "extraction-proofing" is better than none at all. And any change is accompanied by some uncertainty and risk -- but with the diversity of American television viewing at stake, I believe we should approach that change only incrementally.

The health and vigor of the U.S. television programming industry is, as we've learned from this proceeding, far more than a mere dollar issue. This industry's creative work product has showcased American values around the globe. Values like democracy, free speech, and free enterprise. These are the concepts that can excite the minds of viewers throughout the world, and provide a sense of the political and social options that are simply unknown in many of the information-starved countries now reached by American television programming.

I hope that the Commission's work today in deregulating, to a great degree, the networks, while attempting to ensure the health and diversity of the creative community that supplies our dreams, will serve the broadest interest of the American viewing public.

The rules we approve today give the networks far reaching new liberties, while maintaining minimal safeguards to protect the diversity of programming that the American television public and the world at large has come to expect.

I trust and pray that diversity will continue under our new regime.

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STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

RE: In the Matter of Evaluation of the Syndication and Financial Interest Rules, MM Docket No. 90-162

In this Financial Interest and Syndication ("Fin-Syn") proceeding, the Commission issued a Notice of Proposed Rulemaking on March 14, 1990; allowed the parties to negotiate until June 1990; after failed negotiations, received comments to our March 14, 1990 notice; issued a Further Notice of Proposed Rulemaking on October 22, 1990; received comments to that Further Notice; held an En Banc meeting in December 1990; received comments subsequent to that En Banc; received numerous ex parte contacts from interested parties; and held several rounds of meetings with interested parties or their representatives. The item was removed from the March agenda and the Commission issued an Order Requesting Further Comment to two proposals on March 15, 1991. The Commission received another round of comments on the two proposals in that second notice, and held another round of meetings in response to those proposals. As of today, this proceeding probably has received as much, if not more, notice and opportunity for comment as any other major proceeding in Commission history.

There has been much turbulence surrounding this docket. The parties to this proceeding all have deep-rooted economic interests in the outcome of our decision. Their self-interests have prevented them from negotiating and presenting an industry solution to the issues raised by the existing rules. Throughout this time, I have listened to their arguments and reviewed their positions in the record. While doing so, I developed public interest policy objectives which guided me in my review of specific proposals to modify the Fin-Syn rules. These objectives are: (1) Promote a diversity of program sources and broadcast outlets; (2) Encourage emerging networks; (3) Account for the global competitiveness of U.S. media companies, both broadcast and nonbroadcast; and (4) Adopt rules that are clear and enforceable. After reviewing the record, I identified specific areas that needed to be addressed in order to satisfy these policy objectives. First, I believe the Commission should continue to support a policy framework that promotes competitive and diverse program choices for local television stations. Second, in light of the changes to the video marketplace since 1970, I felt the Commission's Fin-Syn rules needed to give existing broadcast networks more flexibility to compete in today's domestic and international video markets. Third, to promote long-term structural diversity, I found that our Fin-Syn

rules needed to provide more flexibility for the development of emerging networks. Finally, the Commission needed to establish clear criteria for enforcing its rule modifications and reviewing the efficacy of such rules within a reasonable period of time.

Our decision today is supported by the record, which includes the most recent round of comments and ex parte filings submitted prior to this April agenda meeting. In my mind, our decision represents an interim step for providing existing and emerging networks with more competitive flexibility while retaining narrowly focused restrictions that address my diversity concerns in this proceeding. I believe the Commission continues to have a substantial interest in upholding its diversity concerns in the media area. The record in this proceeding identifies the public interest benefits spawned by a diversity of program production sources and local television outlets. I wish to continue to balance those concerns against the economic realities of a changing video market. This Order approximates the balance necessary to address my policy goals. It grants more economic flexibility to existing and emerging networks without completely sacrificing the diversity concerns which I hold in high regard. In the long term, I believe that diversity in the media will be achieved in the marketplace through more competitive program outlets of all types -- networks, independent stations, public television stations, cable, satellite, and wireless cable. Until the record reflects that the video market offers a greater number of competitive program outlets, with comparable audience reach, I will continue to support narrowly tailored restrictions that promote program diversity in the local television market.

Separate Statement of
Commissioner Ervin S. Duggan

In re: Evaluation of the Syndication and Financial Interest Rules

After reviewing the record in this proceeding, I am convinced that a substantial lifting of the Financial Interest and Syndication Rules would serve the public interest. Under the rules that we now adopt, the major broadcast networks are permitted to become profit participants in the subsidiary rights of their entire program schedule. They can syndicate 100 percent of their schedule internationally. They can acquire domestic syndication rights in their entire schedule. They can syndicate domestically all of their in-house programming, which we define generously. All this amounts to broad, even sweeping, relief for the networks from the former rules. It propels the networks toward the ends they sought so avidly in this proceeding: greater leeway to participate in the lucrative domestic syndication market and greater freedom to compete in the international program marketplace. The networks, moreover, can anticipate further lifting of these rules within a few years, if the Commission determines that diversity has not suffered by this deregulation.

The wide latitude that we now grant to the networks makes it all the more essential, in my judgment, to keep some restrictions on the networks' ability to manipulate the program production and syndication markets. I fear that the safeguards we adopt today may prove too weak to protect fully the smaller independent producers, the independent television stations, and the smaller independent syndicators--- the very parties who have provided much of the innovative spirit and programming diversity that have well-served the viewing public in the past. Fortunately, the reporting requirements that we are enacting should help us monitor network conduct and the effectiveness of our safeguards in these areas, and may even deter anticompetitive behavior.

Although our revised network definition is readily understandable and will give emerging networks the flexibility they need to grow, I find it to be overly simple. Throughout this proceeding, I have been concerned that some actual index of market position--- perhaps a combination of factors including audience share--- might better suit the purpose of applying our Financial Interest and Syndication Rules than just program hours

or audience reach. A more complex definition could also prevent evasive manipulation of our rules. Unfortunately, there is insufficient evidence in the record to adopt an audience share approach at this time. If this issue is ever revisited, I hope that the record on this point can be expanded.

Despite these concerns, I see no benefit for the public or for the affected parties in withholding my vote in the hope of a perfect outcome. No such perfect outcome has emerged, after all--- even after long years of negotiations by the parties and a long-simmering political controversy about the rules. The rules we have adopted remain far closer to my views on this subject than the solutions offered by my dissenting colleagues. Other options may have the allure of simplicity--- simple repeal, for example, or splitting the network schedule in some fashion. I cannot support sudden repeal, however--- because I believe that balanced, incremental deregulation will pose less danger to programming diversity and better protect our traditional public interest concerns. I also reject any arbitrary splitting of the network schedule, because I believe that carefully tailored safeguards are the more prudent course: far more likely to prevent network coercion while we assess the effects of this deregulation.

Accordingly, I support the decision of the majority.

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